Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

John Crosetto, Kenneth J. Doran, and Douglas W. Kammer,
Petitioners

vs.

State Bar of Wisconsin, Stephen L. Smay, Nathan S. Heffernan, Shirley S. Abrahamson, William A. Bablitch, William G. Callow, Louis J. Ceci, Roland B. Day and Donald W. Steinmetz, Justices of the Wisconsin Supreme Court, Respondents

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a motion for declaratory relief is moot when it asserts, *inter alia*, that a bar's current dues reduction plan violates an attorney's First Amendment rights of free speech and association because:

a. the standard used for charging bar activities deviates from *Keller's* guiding standard by requiring payment for activities unrelated to regulating the legal profession or improving the quality of legal services.

b. all chargeable activities are not supported by compelling state interests which cannot be achieved through alternative and less restrictive means.

c. it forces members to arbitrate constitutional challenges to the plan before they can proceed in federal court and gives preclusive effect to any subsequent arbitration awards.

2. Whether attorneys must face imminent disciplinary action before seeking declaratory relief against judges who have sworn that they would not deny their enforcement role and who also are being charged with reversing their decision to make a dues reduction plan retroactive following a disputed *ex parte* communication between one of their agents and a bar official.

3. Whether qualified immunity can be granted to a bar official before a jury decides whether he has violated the Fourteenth Amendment by depriving bar members of their liberty and property without due process of law and by engaging in a policy of subverting their rights by, *inter alia*, forcing them to financially support a political action committee and by having a disputed *ex parte* communication with a court official.

4. Whether a unified bar is entitled to sovereign immunity when it has been denied in related litigation and after that bar states here on three occasions that it would not raise this defense and after it tells the United States Post Office that it is not a governmental entity.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No.

JOHN CROSETTO, KENNETH J. DORAN, AND DOUGLAS W. KAMMER, PETITIONERS

vs.

STATE BAR OF WISCONSIN, STEPHEN L. SMAY, NATHAN S. HEFFERNAN, SHIRLEY S. ABRAHAMSON, WILLIAM A. BABLITCH, WILLIAM G. CALLOW, LOUIS J. CECI, ROLAND B. DAY AND DONALD W. STEINMETZ, JUSTICES OF THE WISCONSIN SUPREME COURT,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Plaintiffs-Appellants John Crosetto, Kenneth J. Doran, and Douglas W. Kammer, ("Plaintiffs"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-19a) is reported at 12 F.3d 1396. The District Court's unreported order adopting the Magistrate's report is contained at App., *infra*, 20a–21a. The Magistrate's report (App., *infra*, 22a–51a) is reported at 810 F.Supp. 966. The District Court's dismissal of Defendant Justices as defendants (App., *infra*, 50a–55a) is reported at 771 F.Supp. 224. The District Court's unreported

order denying class certification is contained at App., *infra*, 56a–68a.

JURISDICTION

The District Court's jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3). The judgment of the Court of Appeals was entered on December 20, 1993, and Plaintiffs' Petition For Rehearing, With Suggestion For Rehearing En Banc, was denied on January 24, 1994 (App., *infra*, 69a–70a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution are the First, Seventh, Eleventh, and Fourteenth Amendments; the applicable provision of the Wisconsin Supreme Court's Rules is SCR:10:03(5)(b); and the pertinent statutory provision is 28 U.S.C. § 1983. All of these provisions are set forth in App., *infra*, 71a-72a.

STATEMENT

1. The Nature of the Case

1. Plaintiffs Crosetto, Doran, and Kammer practice law in the State of Wisconsin and at all times material herein have been required by the individually named Defendant Justices of the Wisconsin Supreme Court, ("Justices"), to belong to the State Bar of Wisconsin, ("State Bar"), and to financially support all of its legislative, political, and other activities except those covered by a dues reduction plan. Throughout this time, Defendant Stephen L. Smay, ("Smay"), has been the State Bar's Executive Director and Edgar E. Lien, ("Lien"), served as its Government Relations Director and lobbyist.

Through Lien, the State Bar operated LAWPAC, a political action committee which gave financial support to political candidates. Defendants State Bar and Smay admit that Plaintiffs' dues money was used to help support Lien's work on

LAWPAC.[1] It is impossible to determine how much of Plaintiffs' dues money was spent on LAWPAC since Lien admits to never recorded any of the time he spent on it.[2] Lien told the State Bar's Board of Governors in a 1981 memorandum (Sep. App. 6):

> . . .
>
> The expedient of renting a separate postal box for LAWPAC, would tend to conceal the relationship of the Bar and LAWPAC and thereby frustrate Legislative intent, but we would not object to the change if it would mitigate any hostility toward LAWPAC.

LAWPAC subsequently obtained a separate postal address which Lien told LAWPAC officers to ignore because they should direct their mail to him at State Bar headquarters (Sep. App. 6). Lien admits to running LAWPAC out of his State Bar office (Sep. App. 178), and a committee appointed by the

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[1] See Defendants State Bar of Wisconsin and Stephen L. Smay Response To Plaintiffs' Request For Admission Of Facts, hereinafter "State Bar Admissions," (Docket No. 394), at 10, Response No. 43. Although not now before this Court, Plaintiffs have referred to the record throughout their petition to support their factual claims and to enable this Court to review these parts of the record, if it so desires. All references to "Docket No." refer to the District Court's docket sheet.

[2] Lien 1989 Dep., p. 4 (Sep. App. 151). References to "Lien 1989 Dep." refer to Lien's August 30, 1989, Deposition (Docket No. 104), and "Lien 1991 Dep." refer to Lien's April 8, 1991, Deposition (Docket No. 307). References to "Smay 1989 Dep.," "Smay 1990 Dep.," and "Smay 1991 Dep." respectively refer to Mr. Smay's August 29, 1989 (Docket Nos. 106, 197), November 26 and 27, 1990 (Docket Nos. 305, 306), and April 8, 1991 (Docket No. 308), depositions. Cited excerpts from the depositions are contained in Plaintiffs' Separate Appendix, ("Sep. App."), which they filed with the Brief and Attached Appendix of Plaintiffs-Appellants John Crosetto, Kenneth J. Doran, and Douglas W. Kammer, ("Plaintiffs' Brief"), to the Court of Appeals. The Reply Brief of Plaintiffs-Appellants John Crosetto, Kenneth J. Doran, and Douglas W. Kammer to the Court of Appeals is hereinafter referred to as "Plaintiffs' Reply Brief."

Wisconsin Supreme Court found that the State Bar controlled LAWPAC and that Lien was "not required to take any time off or in any other way reimburse the State Bar for any of his LAWPAC activities" (Sep. App. 6).

It is impossible to determine how much of Plaintiffs' dues money was spent on each of the State Bar's other political and legislative activities because Lien failed to maintain complete and accurate time records for his expenses.[3] Thus, Mr. Smay has admitted that State Bar employees were not required to fill in and file their time reports—which are used to determine how much money the State Bar spends on given activities—until the eleventh of the following month; i.e., from 11 to 42 days after the fact (Sep. App. 252–253). Lien—whose time records are the focus of Plaintiffs' claims that proper time and other records have not been maintained—testified that he usually did not fill out and file his time reports until the eleventh of the following month because, "I don't discipline myself very well." (Sep. App. 152, 181–182.)

Defendant Justices announced on July 1, 1983, that a legislative dues rebate plan would be established which would "entitle a member to a rebate for that portion of his or her dues spent on all legislative activity ..." and that they would hold further proceedings to establish its details.[4] In March 1984, Defendant Justices issued an Order stating that a legislative rebate plan would be retroactive to July 1, 1983, and that they would hold a public hearing to determine its specific details (Sep. App. 299). Mr. Smay testified that upon receiving the Order, he probably telephoned either Director of State Courts J. Dennis Moran or Wisconsin Supreme Court Administrator William Mann to discuss whether the plan would

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[3] That is why Mr. Smay during his deposition could not ascertain the State Bar's actual legislative expenses on a bill-by-bill basis when given the specific opportunity to examine the State Bar's own files, all of which were in the room and readily available for his inspection (Sep. App. 272-280).

[4] See *Report of Committee to Review the State Bar,* 112 Wis. 2d XIX, XXIV, 334 N.W. 2d 544, 548 (1983).

be retroactive. Smay explained: "I called him up on the telephone. I said is there confusion here [i.e., over the retroactive feature of the dues plan]. I'm not positive I did that, but I think I did." (Sep. App. 203–204.)

At no time thereafter did any Defendants ever inform any State Bar members that the dues rebate plan might not be retroactive to July 1, 1983, or that the Justices were reconsidering the question of retroactivity. The Justices conducted further hearings in 1984 and 1985 and in February 1985 issued an Order proposing four alternative dues rebate plans. In hearings up to that point, Defendants State Bar and Smay represented to the court that: (1) they would maintain proper time and expense records for all bar activities (Sep. App. 10, 16); and (2), a study committee recommended a limited dues reduction plan, when it, in fact, recommended a much broader plan (Sep. App. 15, 18).

In January 1986, the Justices announced that a dues reduction plan would become effective on July 1, 1986, via enactment of Supreme Court Rule 10:03(5)(b), and that a dues reduction would be offered for expenses incurred on direct "legislative advocacy."[5] They did not state why the plan did not cover all legislative activities per their earlier June 1, 1983, decision or why it was not made retroactive to July 1, 1983, per their March 1984 Order.

By order dated May 26, 1988, Defendant Justices suspended the mandatory membership rule pending resolution of the *Levine* litigation which centered on Wisconsin's mandatory

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[5] *In the Matter of the Amendment of State Bar Rules SCR:10:03(5),* 127 Wis. 2d XI, 374 N.W. 2d XLV (1986). Pursuant thereto, the State Bar established a dues reduction plan effective July 1, 1986, which permitted members to arbitrate whether the size of the dues reduction for "legislative advocacy" had been accurately determined, but which did not permit arbitration of any other questions. See *Petition to Review Bar Bylaw Amendments,* 139 Wis. 2d 686, 407 N.W. 2d 923 (1987); Smay 1990 Dep., Ex. 11, at 8.

membership rule (Sep. App. 304),[6] and membership in the State Bar became voluntary between July 1, 1988–June 30, 1992.

The Justices in March 1992 announced reimposition of the mandatory membership rule effective July 1, 1992, and that SCR:10:03(5)(b) (Sep. App. 308–309), was being amended to provide that the State Bar could "use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the State Bar." SCR:10:03(5)(b) also provided for a dues arbitration process for those State Bar members wishing to challenge the accuracy of any dues reduction, but nothing else. *Id.*[7]

Defendants State Bar and Smay, however, ignored this standard and adopted a different standard; i.e., one which charged for all bar activities except those deemed to be "ideological" or "political," thereby requiring Plaintiffs and Wisconsin's approximately 19,000 attorneys to financially support activities which did not relate to either regulating the legal profession or improving the quality of legal services.[8]

Defendants State Bar and Smay acknowledge that they subsequently petitioned the Wisconsin Supreme Court in

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[6] Wisconsin's mandatory membership rule was declared unconstitutional in *Levine v. Supreme Court of Wisconsin*, 679 F.Supp. 1478 (W.D. Wis. 1988). On appeal, that decision was reversed by the United States Court of Appeals for the Seventh Circuit. See *Levine v. Heffernan*, 864 F.2d 457 (CA 7 1988), *cert. denied*, __U.S.__, 110 S. Ct. 204 (1989).

[7] See *In Matter of State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 484 N.W.2d 225 (1992. Pursuant thereto, Plaintiffs participated in the subsequent dues arbitration proceeding conducted before Arbitrator Edward B. Krinsky. There is a dispute whether Arbitrator Krinsky's award should be part of this record and whether he addressed any of Plaintiffs' constitutional challenges, with Defendants State Bar and Smay asserting at oral argument that he did. Plaintiffs maintain otherwise.

[8] This different standard was set forth in the Notice Concerning State Bar Dues Reduction And Arbitration Process, hereinafter "Notice," which Defendants State Bar and Smay sent to all Wisconsin lawyers in June 1992 (Sep. App. 72-77).

February 1993 to change SCR:10:03(5)(b) so as to provide for all bar expenses being chargeable except those deemed to be "political" or "ideological."[9] In March 1993, Defendant Justices granted the petition by announcing that effective July 1, 1993, SCR:10:03(5)(b) would be changed to that effect, and SCR:10:03(5)(b) so now provides. (App., *infra*, 72a).[10]

2. Plaintiffs filed their initial complaint under 42 U.S.C. § 1983 (App., *infra*, 72a) on May 19, 1988, in the District Court for the Western District of Wisconsin where it was assigned to the Honorable Barbara B. Crabb. In 1990, Plaintiffs amended their complaint, herein "Complaint," (Docket No. 127). to charge that Defendants forced Plaintiffs to financially support the State Bar's LAWPAC and other legislative and political activities from August 1980 to July 1, 1988, contrary to the First and Fourteenth Amendments to the United States Constitution. (App., *infra*, 71a) See Complaint ¶16, at 4; ¶141, at 47.

It also charged that they took away Plaintiffs' property and liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution by: (1) Mr. Smay's disputed *ex parte* telephone call with a representative of the Wisconsin Supreme Court over the July 1, 1983, retroactive feature of a dues reduction plan; (2) the Justices' abandonment of their prior Order to make the plan retroactive; (3) not telling Plaintiffs that Defendant Justices were reconsidering their decision to make the plan retroactive; (4) maintaining faulty procedures for recording employee time, thereby preventing Plaintiffs from knowing where their dues money went; and (5), failing to have any procedures in place before 1986 to provide for the return of any of their dues money spent on constitutionally impermissible subjects such as LAWPAC. See

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[9] See Brief of Defendants-Appellees State Bar of Wisconsin and Stephen L. Smay to the Court of Appeals, ("State Bar Brief"), at 32-33 n.16.

[10] See *In the Matter of the Amendment of Supreme Court Rules 10:03(5)(b) - State Bar Membership Dues Reductions*, 174 Wis. 2d xiii (1993), contained in the Supplemental Appendix to the State Bar's Brief, at 237-238.

Complaint, ¶118–121, ¶141, at 39–41, 47; Pretrial Order ¶11 (Sep. App. 95).

Defendants State Bar and Smay also are charged with engaging in a practice and policy of subverting Plaintiffs' rights by, *inter alia*: (1) forcing Plaintiffs to support LAWPAC; (2) trying to conceal their LAWPAC activities; (3) twice misrepresenting to the Wisconsin Supreme Court that they would maintain proper time and expense records and then not doing so (Sep. App. 10; 16); (4) not requiring employees to fill out and file their time reports until up to 42 days after the fact, thereby making it impossible for Plaintiffs to now determine where their dues money has gone; (5) twice misrepresenting to the Wisconsin Supreme Court that a special study committee favored a limited dues reduction plan when it did not, to maximize how much of Plaintiffs' dues money was spent on their legislative and political activities (Sep. App. 15; 18); and (6), Mr. Smay's apparent *ex parte* telephone call. See Complaint, ¶142 at 47–48; Pretrial Order (Sep. App. 90–92).

Plaintiffs seek a declaratory judgment that the current dues reduction plan is unconstitutional (Docket No. 378), and a preliminary injunction to bar Defendants State Bar and Smay from violating Plaintiffs' constitutional rights by maintaining such an unconstitutional dues reduction plan (Docket Nos. 344, 357). Plaintiffs want a jury trial (Docket Nos. 20, 379), and seek class certification (Docket No. 122). As a remedy, Plaintiffs seek pro-rata legal money damages, nominal and punitive damages. See Complaint, ¶ H, at 50–51.

2. The Course of Proceedings Below

Judge Crabb in June 1988 issued a stay of proceedings (Docket No. 13), pending resolution of *Levine, supra*, which she lifted in December 1988 (Docket No. 27), after the Seventh Circuit Court of Appeals reversed her determination that Wisconsin's mandatory membership rule is unconstitutional. On June 15, 1989, she recused herself because she was a member

of Defendant State Bar (Docket No. 86).[11] The Honorable Stanley J. Roszkowski of the Northern District of Illinois was then designated to hear this matter in another district (Docket No. 87).

Judge Roszkowski on February 21, 1990, issued a second stay of proceedings (Docket No. 132), and lifted it in June 1990 (Docket No. 139), after the Court ruled in *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990), that it is unconstitutional for unified bars such as Defendant State Bar to force bar members to financially support any bar activities which do not meet the "guiding standard" set forth therein; i.e., those which are not "necessarily or reasonably incurred for the purpose of regulating the legal profession 'or improving the quality of legal services available to the people of the State.'"

Judge Roszkowski on November 16, 1990, dismissed the individual Justices as defendants pursuant to their Motion To Dismiss (App., *infra*, 50a–55a). In doing so, he did not address Plaintiffs' claim, set forth in their brief opposing the Motion To Dismiss (Docket No. 146 at 5–8), that the Justices are proper parties to determine whether one of their representatives had the *ex parte* communication testified to by Defendant Smay.

On August 24, 1992, Magistrate P. Michael Mahoney of the Northern District of Illinois issued his Report and Recommendation ("Report"). (App., *infra*, 22a–49a). He recommended that Defendants State Bar and Smay's motion for summary judgment be granted (App., *infra*, 43a); that Plaintiffs' second motion for a preliminary injunction be denied on the ground that it was not "ripe" because Plaintiffs had to submit their constitutional claims to arbitration (App., *infra*, 48a–49a);

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[11] Before she did so, Judge Crabb denied Plaintiffs' Motion for Class Certification without prejudice (App., *infra*, 58a–71a) (Docket No. 85). Plaintiffs subsequently filed an amended motion for class certification and moved to vacate her initial denial of class certification (Docket Nos. 96, 105, 122). Defendants State Bar and Smay opposed the motion (Docket Nos. 99, 169). The District Court dismissed these motions as "moot." (App., *infra*, 51a).

and that all other pending motions be dismissed as "moot." (App., *infra*, 49a).[12]

Instead of addressing Plaintiffs' pending claims, he stated that he would address only those claims which were before Judge Crabb in 1989 (App., *infra*, 37a, n.3). He thus did not address Plaintiffs' subsequent claims, filed after Judge Crabb recused herself, which assert that Defendants State Bar and Smay: (1) engaged in a practice and policy of subverting Plaintiffs' constitutional rights; and (2), deprived Plaintiffs of their liberty and property without due process of law. (Sep. App. 32, 51, 52) He also did not address any of the specific constitutional challenges to the plan.

After Plaintiffs filed detailed Objections to the Report and a supporting memorandum,[13] the District Court on October 22, 1992, issued a minute order adopting, the Report and dismissing Plaintiffs' entire cause of action (App., *infra*, 20a–21a), and final judgment to that effect was entered on October 28, 1992. In doing so, the court: (1) did not address any of Plaintiffs' Objections to the Magistrate's Report; (2) did not explain why the Magistrate's inaccurate characterization of Plaintiffs' claims was being adopted; (3) did not explain why it was refusing to rule on those pending claims; (4) did not address the merits of Plaintiffs' subsequently filed second

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[12] He also discussed an issue which is not even part of this case—the history of Wisconsin's unified bar and the question of whether its mandatory membership rule is constitutional (App. *infra*, 23a–29a). Plaintiffs dropped this complaint allegation after the *Levine* litigation ended (Docket No. 258), and thereafter expressly reiterated that they were not litigating this issue in a July 27, 1992, letter to the Magistrate (Docket No. 359), sent and received prior to issuing his Report.

[13] Plaintiffs there pointed out that the Magistrate had misstated Plaintiffs' claims and that he did not address all the claims pending before the court. (Sep. App. 100–109). Plaintiffs also objected to the Magistrate's statement that Plaintiffs had failed to file a response to Defendants State Bar and Smay's proposed statement of undisputed facts (App., *infra*, 23a). Plaintiffs did prepare such a response, as shown by the District Court's own docket sheet (Docket No. 292). Defendants State Bar and Smay filed a brief in support of the Report and did not file any objections to it (Docket No. 380).

motion for a declaratory judgment (Docket No. 378); and (5), failed to address Plaintiffs' Second Jury Demand asking that a jury decide whether Defendants Smay and State Bar are continuing their policy of subverting Plaintiffs' rights (Docket No. 379).

The Court of Appeals issued its decision on December 22, 1993 (App., *infra*, 1a–19a), affirming in part, vacating in part, and remanding part of the case back to the District Court.

It affirmed the District Court's dismissal of Defendant Justices as defendants on the grounds that "Plaintiffs' prayer for injunctive relief ... fails to present an Article III case or controversy" (App., *infra*, 13a). The court also dismissed Mr. Smay as a defendant on the ground that he was entitled to qualified immunity "Because the law confronting Smay before 1990 did not clearly establish to a sufficient legal consensus that his activities would subject him to any liability ..." under *Keller* (App., *infra*, 16a). The court remanded to the District Court Plaintiffs' allegations against the State Bar to determine if it is entitled to sovereign immunity under the Eleventh Amendment to the United States Constitution (App., *infra*, 71a), and whether, if it is, there are any exceptions to such immunity allowing this matter to proceed to trial (App., *infra*, 9a–13a).

In doing so, the court failed to mention that Defendant Justices have twice admitted to their enforcement role,[14] and that, in response to Plaintiffs' interrogatories, each swore under oath that he/she would not deny acting in that capacity (Docket No. 108). It also failed to find that the State Bar on three occasions in this litigation stated that it would not raise a state agency defense,[15] and that Judge Crabb ruled in *Levine* that

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[14] They did so in their May 26, 1988, Order announcing that the mandatory membership rule "shall not be enforced" (Sep. App. 304), and then in Defendant Justice Heffernan's June 1, 1988, letter to all Wisconsin attorneys to that same effect (Docket No. 146) (Attachment B).

[15] The first representation was made by Attorney John S. Skilton in the midst of Mr. Smay's August 29, 1989, deposition (Smay 1989 Dep., 112-113); (continued...)

the State Bar is not entitled to sovereign immunity *Id.* 679 F.Supp. at 1487–88.

The court also failed to rule on all of Plaintiffs' claims and misstated Plaintiffs' position by stating that Plaintiffs are seeking to enjoin reintegration of Defendant State Bar, (App., *infra*, 6a–7a), which is incorrect; that Plaintiffs are seeking injunctive relief against Defendant Justices, (App., *infra*, 13a-14a), which is incorrect; that Plaintiffs are only charging Defendant Smay with commingling Plaintiffs' dues money with LAWPAC, (App., *infra*, 6a), which is incorrect; and that Plaintiffs concede that their claims against Defendant Justices are not ripe, (App., *infra*, 14a), which is incorrect.

Plaintiffs on January 3, 1994, filed a Petition For Rehearing, With Suggestion For Rehearing En Banc, herein "Petition For Rehearing." It was denied on January 24, 1994, (App., *infra*, 69a–70a), with the Order stating that the original panel members had voted to deny a rehearing and that no member of the court on active service had asked for a vote on whether to grant rehearing.

REASONS FOR GRANTING THE PETITION

The importance of this case to Wisconsin's approximately 19,000 attorneys, and to the many attorneys in the country's other 35 unified bars, is reflected by the fact that Plaintiffs' Petition satisfies virtually all the reasons set forth in Supreme Court Rule 10(a), (b), and (c) as to why review should be granted.

For by forcing Wisconsin's attorneys to support all bar activities except those labeled "political" or "ideological," Defendants have adopted a standard which directly conflicts

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[15](...continued)
the second by Attorney William M. Conley at a February 7, 1991, status conference before Magistrate Mahoney (February 7, 1991, Transcript of Proceedings, at 59, Docket No. 231); and the third in a February 25, 1991, letter from Attorney Conley to Plaintiffs' attorney, Amedeo Greco, (Sep. App. 58-59).

with *Keller's* "guiding standard" and which also conflicts with the standards followed by other state and federal courts. This Court's authoritative voice as the final arbiter of federal questions hence is needed to resolve the ongoing conflict surrounding which constitutional standard must be followed by the country's 36 unified bars.

This Court's direction also is needed to settle some of the important questions which have arisen since *Keller* was decided such as whether a unified bar must prove that all chargeable expenses are justified by compelling state interests which cannot be achieved by alternative and less restrictive means; whether bar members must arbitrate constitutional challenges to a dues plan before they can proceed in federal court; and whether a unified bar is an arm of the state for the purpose of receiving sovereign immunity.

This Court's power of supervision also is needed to address and remedy the Court of Appeals' extraordinary judgment which misstates Plaintiffs' claims at almost every turn and which thereby represents *de facto* conflicts with the Court's prior holdings involving mootness and declaratory relief; qualified immunity; summary judgment; the right to seek declaratory relief against judges; and the right to trial by jury. This Court, as a matter of judicial policy, should not permit its holdings to be disregarded through the misstatements found here.

Even more extraordinary was the court's refusal to acknowledge and address Plaintiffs' motion asking that the current dues plan be declared unconstitutional and its refusal to find the Defendants State Bar and Smay admit to not following *Keller's* guiding standard from July 1, 1992, to the present.

And, most extraordinary of all, the court refused to correct any of its manifest errors even after Plaintiffs pointed them out in their Petition For Rehearing, which was summarily denied without any explanation as to why the court's wholesale mischaracterizations of Plaintiffs' claims were being allowed to stand and why Plaintiffs' stated claims were being ignored.

These errors adversely affect Wisconsin's approximately 19,000 attorneys whose constitutional rights are being violated today under Defendants' unconstitutional dues reduction plan, and whose rights will continue to be violated unless this Court acts to protect them. All this is why further review of this case is needed.

1. The Wisconsin Supreme Court, By Amending SCR:10:03(5)(b), Has Resolved An Important Federal Question In A Way Which Conflicts With The Court's Decision In *Keller*

Keller cannot be any clearer in identifying which bar activities are to be chargeable and which are not, as it provides:

> "Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal services available to the people of the state.'" 496 U.S., at 14.

Under this "guiding standard," then, the only bar expenditures which can be charged are those relating to regulating the legal profession or improving the quality of legal services—and nothing else. Defendants State Bar and Smay, however, admit to following a different standard from July 1, 1993, to the present because SCR:10:03(5)(b) from that date forward has provided:

> The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The State Bar may not use compulsory dues of any member who objects to that use for political or ideological activities that are reasonably intended for the purposes of regulating the legal profession or improving the quality of legal services. The State Bar shall fund those political or

> ideological activities by the use of voluntary dues, user fees or other sources of revenue.[16]

In other words, all bar activities are chargeable except those designated as "political" or "ideological." Plaintiffs and Wisconsin's approximately 19,000 other attorneys thus are being forced today to financially support bar activities which are not related to either regulating the legal profession or improving the quality of legal services—in direct violation of *Keller's* "guiding standard." Plaintiffs' petition therefore should be granted so that this Court can declare the present plan unconstitutional and thereby bring about compliance with *Keller*.

2. By Amending SCR:10:03(5)(b) And Not Following *Keller's* Guiding Standard, The Wisconsin Supreme Court Has Resolved An Important Federal Question In A Way Which Conflicts With Decisions Of The New Hampshire Supreme Court And Of The United States Court Of Appeals For The First Circuit

The New Hampshire Supreme Court ruled in *Petition of Chapman*, 128 N.H. 24, 32, 509 A.2d 753, 759 (N.H. 1986), that the New Hampshire Bar Association, a unified bar, had to limit its legislative activities to:

> those matters which are related directly to the efficient administration of the judicial system, the composition and operation of the courts and the education, ethics,

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[16] The Court of Appeals found that SCR:10:03(5)(b) between July 1, 1992-June 30, 1993, was patterned after *Keller* (App., *infra*, 5, n.3). That was true of SCR:10:03(5)(b) before it was modified in 1993. But, the court never ruled on the constitutionality of the now amended SCR:10:03(5)(b)—just as it never addressed Defendants State Bar and Smay's admissions that: (1) they never followed SCR:10:03(5)(b) between July 1, 1992-June 30, 1993; and (2), they have never followed *Keller's* "guiding standard" from July 1, 1992, to the present.

> competence, integrity and regulation, as a body, of the legal profession.

While this standard only covered legislative activities, it nevertheless foreshadowed this Court's subsequent holding in *Keller* and captured the essence of *Keller's* "guiding standard."

Justice Souter, then a member of the New Hampshire Supreme Court, wrote a concurring opinion in *Chapman* which further clarified this issue by stating: "Under *Abood*, a unified bar association may use the dues of a dissenting member to finance lobbying on a legislative proposal reasonably related to the promotion of any such objective," which he earlier identified as involving "the encouragement of competence and integrity among lawyers and judges; the provision of public access to the legal and judicial systems; and the development of efficient mechanisms to secure and enforce legally recognized rights and the intentions of the transacting parties." 128 N.H., at 37. Again, this standard is much narrower than what SCR:10:03(5)(b) now provides and the standard that Defendants State Bar and Smay have followed from July 1, 1992, to the present.

SCR:10:03(5)(b) also conflicts with the decision of the United States Court of Appeals for the First Circuit in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 640 (CA 1 1990), *cert. denied*, 112 S. Ct. 865 (1992), which held:

> 2. "The Colegio may use mandatory dues and fees only for those expenditures that are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the [Commonwealth]," citing *Keller*, 110 S. Ct. at 2236.

Plaintiffs' petition thus should be granted so that the Court can resolve this conflict.

3. Proper Application Of *Keller* Involves Unsettled And Reoccurring Issues Of Law Which Affect Attorneys In All Unified Bars And Which Can Only Be Settled By This Court

Much of this case centers on a question left unresolved by the Court in *Lathrop v. Donohue*, 367 U.S. 820, *reh'g. denied*, 368 U.S. 871 (1961): whether the rights of Wisconsin's approximately 19,000 lawyers have been violated by requiring them in the past to support Defendant State Bar's legislative and political activities, including LAWPAC, and to support various other activities after July 1, 1992, which do not relate to either regulating the legal profession or improving the quality of legal services.

Plaintiffs maintain that the Court answered this question in *Keller* when it ruled that the "guiding standard" must be whether bar activities "are necessarily or reasonably incurred for the purpose or regulating the legal profession or 'improving the quality of the legal services available to the people of the state,'"—a quoted phrase it took directly from *Lathrop*, 367 U.S. at 843 (footnote omitted). Defendants, though, contend that all of the State Bar's activities are properly chargeable under *Keller* except for those labeled "political" or "ideological," even if that means supporting bar activities which are not related to either regulating the legal profession or improving the delivery of legal services. They apparently base their claim on the Court's statement in *Keller*, at 14, that unified bar members are not required to "fund activities of an ideological nature which fall outside of those areas of activity" [i.e., those previously identified at 13–14 as relating to the State's interest in "regulating the legal profession and improving the quality of legal services"], and the Court's further statement that bar members do not have to support "those activities having political or ideological coloration which are not reasonably related to the advancement of such goals ...." *Id.* at 15.

But, this interpretation totally ignores—and indeed renders utterly meaningless—*Keller's* clearly articulated "guiding

standard" which is much narrower than one which charges for all but "ideological" or "political" activities. Hence, Plaintiffs maintain that *Keller's* reference to "political" or "ideological" activities means only that all bar activities which do not fit the "guiding standard" are, by their very definition, political and/or ideological and thus not chargeable.

But what Plaintiffs and Defendants contend is, of course, immaterial since only this Court can definitely resolve which standard must be followed in Wisconsin and elsewhere.

The Court in *Teachers v. Hudson*, 475 U.S. 292–300 (1986), granted certiorari under similar circumstances because of "The importance of the case, and the divergent approaches of other courts to the issue ..." (footnote citation omitted). That is the same situation here since other jurisdictions may have adopted standards which differ from *Keller's* "guiding standard" and since the importance of this case can be seen by the fact that it also directly affects the entire legal profession in the other 35 jurisdictions having unified bars. Indeed, it is difficult to envision many more important issues to the legal profession than the fundamental one raised herein; i.e., which bar activities can be charged and not charged under *Keller* without violating an attorney's First Amendment rights of free speech and association.

Furthermore, important and reoccurring issues have risen which were not resolved in *Keller* and which should be settled here to provide guidance to the lower courts.

Thus, *Keller* did not expressly address whether the Court's rulings in prior union security cases and other First Amendment cases are applicable to unified bars. Plaintiffs maintain that they are and that the present dues reduction plan is unconstitutional because Defendants have failed to prove that all chargeable bar activities are supported by compelling state interests which cannot be achieved through alternative and less restrictive means. See *Elrod v. Burns*, 427 U.S. 347, 362–363 (1976); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Hudson*, 475 U.S. at 303 n.11. Defendants State Bar and Smay disagree, however, as they asserted before the Court of Appeals

that such a burden is "found in plaintiffs' creative imagination, not in case law." (State Bar Brief at 32.)

Still another post-*Keller* issue centers on Defendants' insistence that bar members must submit their constitutional challenges over the current dues plan to arbitration before they can be brought to federal court and that any subsequent arbitration award be given preclusive effect. Plaintiffs maintain that they are not required to arbitrate constitutional issues because the Court has ruled that civil rights' claimants are not required to exhaust state remedies and because Plaintiffs' statutory claims under § 1983 are separate and distinct from their right under the plan to question the size of any dues reduction offered. See *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Felder v. Casey*, 487 U.S. 131 (1988); *Alexander v. Gardner - Denver Co.*, 415 U.S. 36 (1974). In addition, *Hudson*, 475 U.S. at 307 n.21, holds that preclusive effect cannot be given to an arbitration award issued under a union's dues reduction plan.

And finally, only this Court can provide guidance as to when a given unified bar constitutes an arm of the state for the purpose of receiving sovereign immunity. The Court of Appeals stated that this Court "has never directly addressed the sovereign immunity of state bars ..." and it remanded this issue to the District Court (App., *infra*, 9a–13a). But, in listing the criteria to be considered in determining state agency status, the court totally ignored the criteria found dispositive in *Keller*, i.e., that the bar there receives its principal funding from bar dues; that only lawyers admitted to practice law are members; that it performs advisory functions because it does not admit anyone to the practice of law; and that it does not suspend or disbar anyone. *Id.* at 8.

Furthermore, the court erred in stating that all federal courts that have addressed this issue have found particular state bars entitled to the sovereign immunity defense (App., *infra*,

10a–11a). In fact, Judge Crabb ruled in *Levine* that the State Bar is *not* entitled to this defense.[17]

The court also erred in stating, "The parties never addressed the issue of sovereign immunity ...," (App., *infra*, 11-a, n.10). In fact, the State Bar on three occasions in this litigation stated that this defense would not be raised, *supra*, at 12 n.15, and Plaintiffs' Brief at 44–45 related that fact to the court.

This record also establishes that Judge Crabb's earlier findings are still correct and that the State Bar is not a state agency.[18] Indeed, the State Bar has since represented to the

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[17] She found that "A judgment against the State Bar would not affect the state treasury;" that "The State Bar is empowered to sue and be sued;" that "State Bar funds are deposited in accounts held in the name of the State Bar of Wisconsin, not in accounts of the State of Wisconsin;" that "State Bar funds and the Bar's annual budget are under the control of the State Bar board of governors ...;" that "the State Bar's financial autonomy is an important sign of its overall independence;" that "the State Bar sets its own wage rates and classifications;" that "State Bar employees do not participate in health and physician plans offered to state employees;" that "the State Bar may initiate building projects with approval of the Wisconsin Building Commission ...;" and that "it is largely a self-governing entity" whose "day to day decisions are not subject to approval by the supreme court, the legislature or any state agency." *Levine*, 679 F.Supp. 1478, 1487–1488.

[18] It is difficult to see how any entity can be *less* like a state agency, as the State Bar admits here that all of its vehicles are titled in the name of "State Bar of Wisconsin," and not the State of Wisconsin; that the vehicles are not covered by the state's self-insurance pool; that the insured name on its insurance carrier is "State Bar of Wisconsin"; that its utility services are listed under "State Bar of Wisconsin;" that its telephone number is not listed under the State of Wisconsin; that its employees are not covered under the State of Wisconsin's pension plan; that none of its employees have received any credit under the State of Wisconsin's public pension system or longevity program; that its employees do not receive the same pay and leave statements issued to state employees; that it does not follow the hiring procedures established by the state's Bureau of Personnel; that it does not hire its employees off of eligibility lists established by the state's Bureau of Personnel or any other state agency; that prospective employees are not required to take any state administered exams or tests to be considered for State Bar employment; that it did not follow the state's bidding rules for state agencies

(continued...)

United States Post Office: *"The Bar is not a governmental entity."* (Emphasis added.)[19]

This Court can settle this dispute and provide guidance on an issue likely to recur in § 1983 litigation against unified bars, as this matter was considered by the Court of Appeals and thus is properly before this Court. See *St. Louis v. Praprotnick*, 485 U.S. 112, 120–121 (1988). Moreover, the Court has ruled that while "it is not customary for this Court to review the sufficiency of the evidence ...,"it would do so when "the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditures of judicial resources." *Brook Group v. Brown & Williamson Tobacco*, ___U.S.__, 113 S. Ct. 2578, 2591–2592 (1993).

4. The Court's Power Of Supervision Is Needed To Address Plaintiffs' Claims Which Were Mischaracterized And Thus Never Ruled Upon, Including The Court Of Appeals' Refusal To Address Plaintiffs' Motion Asking That The

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[18](...continued)
when it remodeled its office building; that it does not follow the procedures relating to printing services set forth in state statutes; that the legal name used in all of its legal contracts is "State Bar of Wisconsin;" that the legal name on the W-2 forms it issues is "State Bar of Wisconsin;" that the legal name on its social security records and unemployment compensation account is "State Bar of Wisconsin;" that it is unaware of ever posting any official notices issued by the Wisconsin Department of Employee Relations; that when it purchased property it did not follow the state's rules and regulations established for other state agencies; that it has not attempted to implement the State of Wisconsin's affirmative action and equal opportunity programs; and that it does not file any reports with either the State of Wisconsin's Department of Administration or its Department of Employee Relations. See Supplemental Response of Defendant State Bar to Plaintiffs' Second Set of Interrogatories (Docket No. 410).

[19] Appendix Ex. 2, at 2, Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Docket No. 261).

Current Dues Reduction Plan Be Declared Unconstitutional

The Court's power of supervision is needed here because the District Court departed from the usual course of proceedings by adopting the Magistrate's faulty Report which mischaracterized Plaintiffs' claims as being the same now as they were before Judge Crabb in 1989, (App., *infra*, 37a, n.3), and by refusing to address all of the claims pending before it noted, *supra*, at 10–11. The Court of Appeals, in turn, sanctioned these errors as it, too, mischaracterized Plaintiffs' claims and refused to address all of the claims before it.

Hence, there is not one word in its decision referring to Plaintiffs' second motion for a declaratory judgment asking that the current plan be declared unconstitutional even though: (1) Plaintiffs argued it in their Brief at 40–41, and Reply Brief at 16; (2) Plaintiffs' counsel addressed it in oral argument; and (3), Plaintiffs' Petition For Rehearing at 3–8 pointed out that this motion was pending before the court. The court's refusal to even acknowledge the existence of this motion is inexplicable. It also represents a gross departure from the accepted and usual course of judicial proceedings which dictates that a court must, at the very least, correctly identify all of the claims before it and to then address them *seriatim*.

The Court of Appeals similarly departed from the usual course of judicial proceedings and abused its discretion by:

1. Refusing to find that Defendants State Bar and Smay admit that the dues reduction plan—as applied from July 1, 1992, to the present—has only covered "political" and "ideological" expenses and that it has not followed *Keller's* "guiding standard" as to which bar activities are chargeable.
2. Refusing to address Plaintiffs' claim that Mr. Smay has engaged, and is engaging, in a practice and policy of subverting

Plaintiffs' rights and that he cannot be granted qualified immunity until a jury decides these disputed issues.[20]

3. Refusing to address Plaintiffs' claim that Mr. Smay is not entitled to qualified immunity for his post-July 1, 1990, conduct because he never pleaded that defense to such conduct.[21]

4. Refusing to find that Defendants State Bar and Smay have admitted to spending Plaintiffs' dues money on LAWPAC and by wrongly stating that Defendant Smay has only been charged with commingling Plaintiffs' dues money (App., *infra*, 6a).[22]

5. Refusing to rule on Plaintiffs' claims that they are entitled to declaratory relief and an award of attorney fees against Defendant Justices, and by wrongly asserting that Plaintiffs are seeking injunctive relief against them (App., *infra*, 13a–14a).[23]

6. Refusing to address Plaintiffs' claim that Defendant Justices are proper parties for the purpose of determining whether any of their representatives had the *ex parte* communication testified to by Mr. Smay, *supra*, at 4.[24]

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[20] Plaintiffs' Brief at 25–26, 31–32; Reply Brief at 9–10; and Petition For Rehearing at 10–13 all pointed out that Mr. Smay is not now entitled to qualified immunity in the face of these disputed factual claims.

[21] Plaintiffs' Brief at 28; Reply Brief at 10; and Petition For Rehearing at 11–12 all pointed out that Mr. Smay is not entitled to qualified immunity for his post-1990 conduct—an issue which he did not even dispute.

[22] See State Bar Admissions Response No. 43, at 10. In fact, Plaintiffs have never charged mere "commingling," as they, instead, have pointed to Defendant Smay's own admission that Plaintiffs' dues money was directly spent on Lien's LAWPAC activities. See Plaintiffs' Brief at 12, 25, 31; Reply Brief at 7, 11; and Petition For Rehearing at 11. Furthermore, Plaintiffs' counsel pointed out this admission during oral argument in response to a question posed by a panel member and it was not disputed by counsel for Defendants State Bar and Smay.

[23] Plaintiffs' Brief at 26–27, 42–43; Reply Brief at 2, 20–22; and Petition For Rehearing at 13 all pointed out that Plaintiffs are not seeking injunctive relief against Defendant Justices.

[24] Plaintiffs' Brief at 26–27, 42–43; Reply Brief at 20–23; and Petition For Rehearing at 13–14 all spelled out Plaintiffs' claims against Defendant Justices.

These errors, too, are inexplicable, as was the court's refusal to correct any of them even after Plaintiffs' Petition For Rehearing spelled them out.[25] While of course impossible to determine how the court committed so many errors, it is possible that Defendants' own misstatements to the court contributed to this problem. As can be seen in the Table of Contents in Plaintiffs' Reply Brief (App., *infra*, 73a–78a), Plaintiffs tried to correct these misstatements, but to no avail.

This Court's power of supervision thus is needed because Plaintiffs have been denied the most basic right of all which must be accorded to every litigant in the federal courts—the right to, at the very least, have their claims correctly identified, as that is the very linchpin upon which all judicial proceedings must turn. For when that linchpin is missing, subsequent proceedings will fail to properly address all pending claims and thus will produce the kind of conflicts with the Court's prior holdings detailed immediately below.

5. The Holding Below Conflicts With The Court's Prior Holdings Involving Mootness And Plaintiffs' Right To Declaratory Relief And Trial By Jury

By misstating Plaintiffs' claims, and by refusing to address them even after Plaintiffs' Petition For Rehearing pointed them out, the Court of Appeals' decision represents a *de facto* conflict with *five* of the Court's prior holdings.

One, by ignoring Plaintiffs' second motion for a declaratory judgment, the holding sustains the District Court's dismissal of the motion as "moot" (App., *infra*, 49a) and thus conflicts with

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[25] The Court also erred in stating that Plaintiffs' pending injunction motion is aimed at halting reintegration of the bar. (App., *infra*, 16). In fact, and as pointed out in their Brief at 9–10, Reply Brief at 1–2, and Petition for Rehearing at 9, it is aimed at prohibiting Defendants State Bar and Smay from violating Plaintiffs' rights by maintaining their unconstitutional dues reduction plan (Docket Nos. 344, 357). Plaintiffs are not asking the Court to rule on their injunction motion. They, instead, request that it be remanded to the District Court for further proceedings if the Court finds the present plan unconstitutional for any of the reasons stated herein.

Northeastern Florida Contractors v. Jacksonville, __ U.S.__, 113 S. Ct. 2297, 2301 (1993). There, the Court cited *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), for the "well settled" rule that minor changes in a challenged statute which is still in effect do not render the challenges "moot."[26]

Moreover, Plaintiffs have satisfied the test repeated in *Northeastern Florida Contractors* at 2301, 2302 for invoking a federal court's jurisdiction: (1) they have suffered, and are continuing to suffer, an "injury in fact" in violation of their First Amendment rights because of Defendants' insistence that Plaintiffs support bar activities which do not meet *Keller's* "guiding standard" and because of Defendants' failure to otherwise establish a constitutionally valid dues reduction plan; (2) this ongoing injury is being directly caused by Defendants and not by some third party; and (3), this ongoing injury can be redressed by granting Plaintiffs' requests for declaratory relief and by allowing Plaintiffs to go to trial over the disputed genuine issues of material fact raised in Plaintiffs' Second Jury Demand (Docket No. 379).

Plaintiffs therefore are entitled to a declaration that the present dues reduction plan is unconstitutional because: (1) it does not follow *Keller's* "guiding standard;" (2) it requires State Bar members to go to arbitration before they can bring any of their constitutional claims in federal court and imposes an unlawful exhaustion requirement; (3) it gives unlawful preclusive effect to any arbitration award issued under the plan; (4) the Notice fails to warn prospective objectors that by

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[26] Since the Court of Appeals failed to even mention this pending motion, it is unknown whether its refusal to grant this declaratory relief was predicated on the fact that SCR:10:03(5)(b) was amended effective July 1, 1993, as Defendants State Bar and Smay pointed out in their Brief, at 32–33 n.16. That amendment, however, is insufficient to "moot" this issue since SCR:10:03(5)(b) still does not follow *Keller's* "guiding standard" and since Plaintiffs' other undisputed constitutional challenges are still valid, a point which the Defendants never disputed before the Court of Appeals and which they cannot now belatedly raise. *FTC v. Grolier, Inc.*, 462 U.S. 19, 23, n.6 (1983).

proceeding to arbitration they are waiving their right to obtain *de novo* review of any subsequent award; and (5), the Notice is confusing and constitutionally defective because it does not clearly explain which standard is being used for charging bar activities and because it fails to properly explain a $50,914 charge. See Plaintiffs' Brief 40–41.

Two, Mr. Smay's dismissal as a defendant on qualified immunity grounds and the failure to remand for trial the genuine issues of material fact charging that he is continuing his practice and policy of subverting Plaintiffs' rights, (Docket No. 379), conflicts with *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), which holds: "if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may escape liability." The Court added: "a reviewing court must consider the plaintiffs' factual allegations in resolving the immunity issue." *Id.*, at 529 (footnote omitted). The court's refusal to do that here conflicts with this legal principle.

Moreover, since Mr. Smay has never raised a qualified immunity defense for any of his post-1990 actions arising under the present dues reduction plan, he is not entitled to immunity for this latter period under *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982), which holds: "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official" (citation omitted).

The holding further conflicts with *Mitchell* because it erroneously grants Defendant Smay blanket immunity for all his pre-1990 conduct even though he is being charged with: (1) engaging in a practice and policy of subverting Plaintiffs' rights before July 1988, *supra*, at 8; (2) depriving Plaintiffs of their liberty and property in violation of the Due Process Clause of the Fourteenth Amendment, *supra*, at 7; and (3), forcing Plaintiffs to financially support LAWPAC, a contention that he does not even dispute. Plaintiffs maintain that their rights in all these areas were clearly established at the time and that no immunity can be granted even if one presupposes that Plaintiffs' First Amendment *Keller* rights were not clearly established

before 1990—a contention they in any event dispute. See Plaintiffs' Brief 30–33.

Three, the failure to remand for trial the allegations against Mr. Smay and Defendant Justices conflicts with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), which holds: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." That did not happen here.

The Court of Appeals' holding contains no mention whatsoever of: (1) Lien's letter, *supra*, at 2, which Mr. Smay personally reviewed, (Smay 1989 Dep., at 55–56), urging Defendant State Bar to conceal its relationship to LAWPAC; (2) Mr. Smay's admissions that time records were not filled out and filed until the eleventh of the following month and his inability to identify how much of Plaintiffs' dues money was spent on LAWPAC and particular legislative and political activities, *supra*, at 4; (3) Lien's admissions regarding his own negligent time-keeping and record-keeping practices and his inability to relate how much of his time was spent on LAWPAC, *supra*, at 3; (4) Mr. Smay's admission that Plaintiffs' dues money was used to support Lien's LAWPAC activities, *supra*, at 2–3; (5) Mr. Smay's own testimony relating to his possible *ex parte* communication with a representative of Defendant Justices over the retroactive date of a dues reduction plan, *supra*, at 4–5; and (6), the disputed questions of fact surrounding the present dues reduction plan set forth in Plaintiffs' Second Jury Demand.

The court also failed to follow this legal principle when it dismissed Defendant Justices as defendants and failed to view the record in Plaintiffs' favor, since it totally ignored Defendant Justices' sworn representations that they would not deny their enforcement role[27] and their May 26, 1988, and June 1, 1988,

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[27] Plaintiffs' Complaint, ¶20 at 5, states that Defendant Justices are being sued in their enforcement role. If there is a factual dispute over their role, it must be resolved at trial where Plaintiffs can point to Defendant Justices' own

(continued...)

representations that they do, in fact, enforce the mandatory membership rule (Sep. App. 304) (Docket No. 146). The court also ignored: (1) their June 1983 and March 1984 representations that a dues reduction plan covering all legislative and political activities would be retroactive to July 1, 1983; (2) Mr. Smay's possible *ex parte* communication with one of their agents; and (3), their failure to inform State Bar members that they were reconsidering those decisions, thereby violating Plaintiffs' right to fair notice.[28]

Four, the failure to find that Defendant Justices are proper parties—after they swore that they would not deny their enforcement role—conflicts with *Supreme Court of Va. v. Consumer's Union*, 446 U.S. 719, 736–739 (1980); *Pulliam v. Allen*, 466 U.S. 522, 543–544 (1984), which hold that judges can be sued in their enforcement capacity for declaratory relief and an award of attorney fees, which is exactly what Plaintiffs are seeking here.

The Court of Appeals' incorrect finding that Plaintiffs are seeking injunctive relief against Defendant Justices and that they are not entitled to prospective relief under *Steffel v. Thompson*, 415 U.S. 452 (1974) (App., *infra*, 14a), is therefore misplaced. In fact, *Steffel* supports Plaintiffs' claim since it holds: "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights" *Id.* at 459. It also provides: "a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally

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[27](...continued)
admissions that they help enforce SCR:10:03(5)(b), and their sworn representations in response to Plaintiffs' first set of interrogatories that they would not deny their enforcement role (Docket No. 108), Response No. 38, at 3.

[28] It is axiomatic that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).

flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity ..." *Id.* at 462. That is the precise dilemma Plaintiffs face here if their request for declaratory relief is not granted.

Moreover, it was fundamentally unfair for the court to dismiss Defendant Justices and thereby reward them for falsely swearing that they would not deny their enforcement role, which is what the court did by expecting Plaintiffs' Counsel at oral argument to identify specific attorneys who have been disciplined by Defendant Justices over their failure to pay bar dues (App., *infra*, 14a). At that time, Plaintiffs' Counsel explained that he could not do so because he had relied on their representations in not conducting any further discovery on this issue and that he was never given the chance to obtain such information once they filed their Motion to Dismiss.

Five, the court's failure to identify and to remand for trial Plaintiffs' procedural due process allegations against Mr. Smay and Defendant Justices, *supra*, at 7, conflicts with *Carey v. Piphus*, 435 U.S. 247 (1978), as Plaintiffs are entitled to a jury trial to determine whether these Defendants deprived Plaintiffs of their liberty and property without due process of law.

The holding similarly conflicts with *Beacon Theaters v. Westover*, 359 U.S. 500 (1959), because it deprives Plaintiffs of their constitutional right to trial by jury under the Seventh Amendment to the United States Constitution (App., *infra*, 71a) to resolve all of the disputed genuine issues of material fact involving Mr. Smay and Defendant Justices, including the matters spelled out in Plaintiffs' Second Jury Demand (Docket No. 379).

Review thus is needed to vindicate Plaintiffs' constitutional right to trial by jury and to rectify the aforementioned conflicts with the Court's prior holdings caused by the mischaracterization of Plaintiffs' claims.

CONCLUSION

For all these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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APRIL 25, 1994

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-3899

JOHN CROSETTO, ET AL.,

Plaintiffs-Appellants,

v.

STATE BAR OF WISCONSIN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Wisconsin
No. 88 C 433—**Stanley J. Roszkowski**, *Senior District Judge.*

ARGUED SEPTEMBER 29, 1993—DECIDED DECEMBER 20, 1993

Before FLAUM, EASTERBROOK, and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge.* In this case Wisconsin lawyers, John Crosetto, Kenneth Doran, and Douglas Kammer ("Plaintiffs"), have alleged that the State Bar of Wisconsin, Stephen Smay (the Executive Director of the Wisconsin Bar), and the Justices of the Wisconsin Supreme Court ("Defendants"), violated Plaintiffs' First Amendment rights by requiring Plaintiffs both to join the Wisconsin State Bar and to contribute money for certain political causes in order to practice law in the State. The district court granted Defendants' motion for summary judgment finding that Defendants acted in good faith and holding that

Defendants were entitled to qualified immunity. Furthermore, the district court denied Plaintiffs' motion for a preliminary injunction, upholding the constitutionality of Wisconsin's integrated bar and compulsory membership dues. We affirm in part, vacate in part, and remand this case to the district court for a factual finding.

I. Background

The issue presented here is not wholly new to this court and we are mindful of the long history of litigation surrounding Wisconsin's mandatory bar rule. In 1943, the Wisconsin legislature enacted a bill directing that there "shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in the association shall be a condition precedent to the right to practice law in Wisconsin." Wis. Stat. § 256.31 (1943). Construing the statute to be merely advisory, the Wisconsin Supreme Court initially declined to integrate[1] the State's bar, and allowed the bar association membership to remain voluntary. *See Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943); *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).

By 1956, the Wisconsin Supreme Court had become concerned that "too many lawyers have refrained or refused to join [the voluntary bar association], that membership in the voluntary association [had] become static, and that substantial minority of the lawyers in the state [were] not associated with the State Bar Association." *In the Matter of the Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956). The Court ordered integration of the State's bar on an interim basis, *id.* at 604, and after a two year trial period, the Court permanently integrated the State's bar.

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[1] An integrated bar is one requiring both membership and the payment of dues as conditions of practicing law within the state.

A significant portion of Wisconsin lawyers opposed the Wisconsin Supreme Court's decision and filed a lawsuit alleging that Wisconsin's integrated bar violated the First Amendment. This lawsuit ultimately reached the Supreme Court of the United States. *Lathrop v. Donahue*, 367 U.S. 820 (1961). In *Lathrop*, six justices employed a legitimate state interest test and concluded that Wisconsin's integrated bar did not violate a Wisconsin lawyers' First Amendment rights. But *Lathrop* hardly settled the opposition to Wisconsin's integrated bar. By the late 1970s, resistance to Wisconsin's integrated bar became so pronounced, as the State Bar became increasingly involved in advocating various political policies, that the Wisconsin Supreme Court decided to allow all attorneys who objected to the Bar's political expenditures to reduce their membership dues according to that portion of dues spent on the objectionable political activities. *See Matter of Discontinuation of Wis. State Bar*, 93 Wis.2d 385, 286 N.W.2d 601 (1980).

Unsatisfied by the Wisconsin Supreme Court's dues-reduction compromise, a Wisconsin lawyer filed a federal class action suit challenging the facial constitutionality of Wisconsin's integrated bar. *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988) (hereinafter "*Levine I*"). In *Levine I*, the plaintiff contended that compulsory membership dues facially violate a Wisconsin lawyer's speech and association rights under the First Amendment. *Id.* at 1489. Alternatively, the plaintiff argued that the Bar's use of compulsory dues to fund political advocacy violated the First Amendment and that Wisconsin's dues-reduction compromise failed to cure this defect. *Id.* at 1502. Without addressing the plaintiff's alternative argument, the district court declared that Wisconsin's mandatory bar membership rule and its Bar dues requirement facially violated all Wisconsin lawyers' First and Fourteenth Amendment rights. *Id.* The district court awarded the plaintiff both compensatory and punitive damages, and enjoined the State Bar's from enforcing its mandatory bar-membership rule. *Id.* In its analysis, the district court questioned the continued viability of *Lathrop*, the corner-

stone upon which the defendant's legal arguments for an integrated bar rested. To comply with *Levine I*, the Wisconsin Supreme Court suspended enforcement of the mandatory membership rule. Following the victory in *Levine I*, the opposition lawyers filed the case here before us—*Crosetto v. State Bar of Wisconsin*—hoping to curb further the State's integrated bar.

The district court stayed all its proceedings pending the outcome of *Levine I*'s appeal which was then before the Seventh Circuit. Subsequently, we reversed *Levine I* on appeal, holding that *Lathrop* still controlled the constitutionality of integrated bars and allowed Wisconsin to enforce its integrated bar. *See Levine v. Heffernan*, 864 F.2d 457, 458 (7th Cir. 1988) (hereinafter "*Levine II*").[2] After *Levine II*, the *Crosetto* district court lifted its stay and the parties briefed fully Plaintiffs' motion for class certification. Judge Crabb denied Plaintiffs' motion without prejudice and then recused herself, noting that as a member of the Wisconsin bar, she would be affected by the case's outcome. The Chief Judge of the Seventh Circuit designated Judge Roszkowski from the Northern District of Illinois, to preside over *Crosetto*. Thereafter, the proceedings of *Crosetto* were again stayed pending the decision from the United States Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228 (1990) (posing questions regarding the constitutionality of California's integrated bar).

After the Court in *Keller* upheld California's integrated bar, the Wisconsin Bar began the process of re-integrating. In March 1991, the State Bar approved a petition to the Wisconsin Supreme Court to reinstate the State Bar as a mandatory organization. Following a public hearing, the Wisconsin Supreme Court reestablished the integrated bar, effective July 1, 1992, under a new set of Court rules and

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[2] Notwithstanding *Levine II* the Wisconsin Supreme Court continued its suspension of the bar integration rule until July 1, 1992.

State Bar by-laws.[3] *See In Matter of State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).

Meanwhile, Plaintiffs continued pressing their constitutional objections through this case, *Crosetto*. In *Crosetto*, Plaintiffs alleged that before *Keller*, (1) Defendants had

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[3] *See* Wisconsin SCR 10.03(5)(b) and Wisconsin State Bar Bylaws, art. 1, sec. 5. The newly-enacted Wisconsin Supreme Court Rule 10.03(5)(b) provides the following:

> 1. The state bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar. Other activities must be supported by voluntary dues, user fees or other sources of revenue.
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> 2. Prior to the beginning of each fiscal year, the state bar shall publish written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues. The notice shall indicate the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata dues to be devoted to activities that cannot be supported by compulsory dues. The notice shall be sent to every member of the state bar along with the annual dues statement. A member of the state bar may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues.
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> 3. A member of the state bar who contends that the state bar incorrectly set the amount of dues that can be withheld may deliver to the state bar a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the members's dues statement.
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> 4. If one or more timely demands for arbitration are delivered, the state bar shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the state bar.
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> 5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for members who have delivered timely demands for arbitration for the fiscal year, the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decisions.

forced Plaintiffs to financially support the State Bar's political and other legislative activities contrary to the First and Fourteenth Amendments, (2) confiscated Plaintiffs' property without due process of law, and after *Keller* (3) Defendants implemented a dues reduction plan that still failed the most recent pronouncements of the Supreme Court of the United States. In support of their allegations, Plaintiffs contend that among other things, Defendants commingled resources between the State Bar and its political action committee failed to keep adequate records so that dissenting bar members may obtain a proper refund, and used dues money for political activities unrelated to the regulation of the legal profession.

The Justices of the Wisconsin Court filed a motion to dismiss Plaintiffs complaint against them in that, as Justices, they were absolutely immune from suit for the quasi-legislative conduct, and further, that Plaintiffs lacked any immediate threat of injury. The Northern District of Illinois granted the Justices' motion dismissing them from the case. Then the remaining defendants filed a motion for summary judgment. The district court granted the motion, dismissed the rest of Plaintiffs' case, and denied Plaintiffs' counter motion for a preliminary injunction against the State's integrated bar rule. After reviewing the district court's grant of summary judgment *de novo*, *McMillian v. Svetanoff*, 878 F.2d 186, 188 (7th Cir. 1989), we vacate and remand in part, affirming the rest of the district court's judgment.

II. Analysis

In their appeal, Plaintiffs argue the following: (A) the federal courts have subject matter jurisdiction over Plaintiffs' claims against (1) the State Bar Association as an entity, and (2) the Justices of the Wisconsin Supreme Court, (B) the doctrine of qualified immunity does not bar Plaintiffs' damage claims against the defendant Smay (the Bar's Executive Director) for his alleged official misconduct, and (C) both Wisconsin's present integrated bar and dues re-

duction plan fail to pass constitutional muster thus entitling Plaintiffs to injunctive relief. We shall address these arguments serially.

A. Subject Matter Jurisdiction

Plaintiffs arguments focus on the merits of a qualified immunity defense with respect to both Smay and the State Bar. In so doing, Plaintiffs apparently have assumed that the State Bar, as an entity, is entitled to raise the qualified immunity defense. In fact, the question of whether a non-natural person, such as the State Bar, may raise a qualified immunity defense has yet to be settled.[4] Today we need not grapple with this question because the Constitution of the United States may not grant us any judicial power to hear either Plaintiffs' claims against the State Bar or those against the Wisconsin Justices.

1. The State Bar Association

In our federalist system of dual sovereignty the jurisdiction of the federal courts is limited to the grants of power declared in the Constitution. Plaintiffs having brought their suit in a federal court must endeavor to surmount one of the Constitutions' unavoidable jurisdictional hurdles, that of state sovereign immunity. While we note that a state's sovereign immunity sets a constitutional lid on the exercise of federal judicial power, we must also be mindful that when a citizen sues his home state the Constitution's Eleventh Amendment is evidence, but not the origin of this doctrine.[5] *Hans v. Louisiana*, 134 U.S. 1

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[4] Not only was the non-natural person issue not briefed for us, but Plaintiffs resisted discussing this possible objection even after several pointed queries from this court during oral argument.

[5] We mention this fact only because, in explicating the *Hans* doctrine, some courts have used "the Eleventh Amendment" as a short-hand substitute for the *Hans* doctrine's authority and origin. While convenient, this characterization is imprecise. The text of

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(1890). In developing the *Hans* doctrine, the Eleventh Amendment has served as a historical framework for the Supreme Court's teaching that the Constitution never granted federal courts any judicial power over suits by a citizen against his own state.[6] Without some affirmative constitutional grant the federal courts lack any judicial power to decide a case. *See Hans*, 134 U.S. at 15; *see also Pennhurst v. Halderman*, 465 U.S. 89, 98 (1984). Therefore, when a state citizen sues an entity that happens to be an arm of that citizen's home state, then a

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[5] *continued*
the Eleventh Amendment clearly does not provide for immunity when a citizen sues his resident state. U.S. Const. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[6] The States passed the Eleventh Amendment in reaction to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and constitutionally overruled *Chisholm* which had allowed federal subject matter jurisdiction over a suit against a state by a citizen of another state. Nearly a hundred years later, when a resident citizen attempted to sue his own state in federal court, the Court in *Hans* held that federal courts lacked subject matter jurisdiction over such a suit. The Court reasoned as follows:

> "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.
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> "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans*, 134 U.S. at 15.

federal court, under *Hans* and its progeny,[7] ordinarily lacks subject matter jurisdiction.[8] Of course for the *Hans* doctrine to forbid federal jurisdiction, a suit against the state bar association must appropriately be considered a suit against an arm of the state. While the actual state status of "state" bar associations will vary from state to state, the case law confirms that in several instances state bar associations will be protected by sovereign immunity.

The Supreme Court has never directly addressed the sovereign immunity of state bars,[9] but its approach in re-

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[7] Though criticized, especially by the academy, the *Hans* doctrine has been repeatedly affirmed. *Monaco v. Mississippi*, 292 U.S. 313 (1934); *Employees v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973); *Atascadero v. Scanlon*, 473 U.S. 234 (1985); *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

[8] We say ordinarily because there are exceptions to this bar which concededly make the Eleventh Amendment and *Hans* immunity peculiar jurisdictional rules. For example, Congress can abrogate state sovereign immunity, *see Welch v. Texas Department of Public Transportation*, 483 U.S. at 468 (1987); *Fitzpatrick v. Bitzer*, 427 U.S. at 445 (1976); Furthermore, a state can consent to suit in federal court, *see infra* note 11 and accompanying text.

[9] Neither *Keller*, 496 U.S. 1, the Court's most recent bar-association case, nor *Bates v. State of Arizona*, 433 U.S. 350 (1977) (where the court also decided claims against a state bar on the merits), imply that a suit against a state bar association is not a suit against the state for the purposes of sovereign immunity. The doctrine of sovereign immunity does not apply when, as in *Keller* or *Bates*, the Supreme Court exercises its appellate jurisdiction over a case arising from state court. *McKesson*, 496 U.S. at 27.

Nor can the Supreme Court's review in either *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), or *Hoover v. Ronwin*, 466 U.S. 558 (1984), represent an implicit holding that the jurisdictional bar of sovereign immunity does not apply when a state bar is sued in federal court. In *Goldfarb*, the Court explicitly noted: "The State Bar also contends that it is protected by the Eleventh Amendment. Petitioners dispute this contention, and the District Court had no occasion to reach it in view of its holding. Given the record

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lated areas may be helpful to the analysis. For example, in holding that the actions of a state bar association constituted enough official state action to exempt a state bar from antitrust law, the Supreme Court has noted that "the regulation of the activities of the bar is at the core of the State's power to protect the public. . . . Few other professions are as close to the core of the State's power to protect the public. Nor is any trade or other profession as essential to the primary governmental function of administering justice." *Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984) (citations omitted). The Court concluded that because of this close relationship, "although only the State Bar was named as a defendant in the suit, the [plaintiff's] complaint was with the State." *Id.* at 571.

With respect to state bar associations and sovereign immunity the lower federal courts that have addressed this issue unanimously have found particular state bars entitled to the sovereign immunity defense. *See Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493 (5th Cir. 1986) (holding that federal courts lacked jurisdiction to hear a suit by a Louisianian against the Louisiana State Bar); *Bishop v. State Bar of Texas*, 791 F.2d 435 (5th Cir. 1986) (holding the Texas State Bar could not be sued by a Texan); *Lupert v. California State Bar*, 761 F.2d 1325 (9th Cir. 1986), *cert. denied*, 474 U.S. 916 (1986) (holding that the federal courts lacked jurisdiction to hear a suit by a Californian against the California State Bar); *Ginter v. State Bar of Nevada*, 625 F.2d 829, 830 (9th Cir. 1980) (holding the Nevada State Bar was immune from suit by a Nevadan); *Doyle v. Oklahoma Bar Ass'n*, 787 F. Supp. 189 (D.Okl. 1992) (holding that the Oklahoma state bar association was an instrumen-

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[9] *continued*
before us we intimate no view on the issue, leaving it for the District Court on remand." *Id.* at 792 n.22. (citations omitted). In *Hoover*, the state bar association was already dismissed from the suit by the district court before the case reached the Court. 466 U.S. 565 n.12; *see also Lathrop*, 367 U.S. 820.

tality of the state, and thus, federal courts lacked jurisdiction to hear a suit for damages by an Oklahoman).

We agree that a suit against a state bar association, as a general matter, may constitute a suit against the state for sovereign immunity purposes. Whether the Wisconsin State Bar, in particular, is vested with sufficient state characteristics to qualify for sovereign immunity is a factual question, however, that cannot be answered now on the record before us.[10] We therefore vacate that part of the district court's decision holding for the State Bar of Wisconsin, and remand this case for a determination of the State Bar's sovereign status.

After additional briefing along with any other discovery deemed appropriate, the district court must ultimately determine whether the suit against the Wisconsin State Bar Association is properly considered a suit against the state *qua* state. In making its finding the district court should consider the extent of control exercised over the Bar by the Wisconsin Supreme Court (or the State at large). *See Lewis*, 792 F.2d at 497 discussing *Bates*, 433 U.S. at 361, and *Hoover*, 466 U.S. at 569 n.18, 571. In this matter we agree with *Lewis*, that the analysis presented in both *Bates* and *Hoover* is applicable to questions of sovereign immunity. If the Wisconsin Supreme Court had the ultimate authority to adopt and enforce the Bar's rules in ques-

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[10] The parties never addressed the issue of sovereign immunity, but because it is jurisdictional, we raise it *sua sponte*. *See Pennhurst*, 465 U.S. at 99 n.8 ("The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding."); *Edelman v. Jordan*, 415 U.S. 650, 678 (1974) (holding that a state's sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."); *Shabazz v. Coughlin*, 852 F.2d 697, 699-700 (2d Cir. 1988); *see also* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3524 at 170 n.83 (2d ed. 1984), discussing *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1981).

tion, then a suit against the Bar challenging those rules may be not that different from a suit directly against the Wisconsin Supreme Court. *See Lewis*, 792 F.2d at 497. The district court should also consider, as additional indication of state control, whether the Wisconsin State Bar has a role completely defined by the Wisconsin Supreme Court--that is whether the Bar was acting as the agent of the Court when it promulgated the rules in question. *Id.* Also relevant is whether a judgment against the State Bar would ultimately be paid by the state's treasury. *See Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991); *Cannon v. University of Health Sciences*, 710 F.2d 351, 356 (7th Cir. 1983); *see also Lewis*, 792 F.2d at 498 (holding that since the dues of the Louisiana Bar Association, an integrated bar, are *actually* state license taxes levied by the express authority of the state legislature, they are thus unavailable as damages under the doctrine of sovereign immunity). We hasten to note, however, that even when there is no risk to the state treasury, the state is immune when sued in its own name. *See Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 669 (7th Cir. 1992) (rejecting the notion that an absence of financial impact on the state is a *per se* pass from the Eleventh Amendment's purview); *see also Green v. Mansour*, 474 U.S. 72 (1985). Thus, even without any impact on the state's treasury, the district court must consider whether the Bar occupies the position of a public agency or official, necessarily forbidding any suit in federal court. *See Lewis*, 792 F.2d at 497 (discussing *Bates*, 433 U.S. at 361); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (Sovereign immunity forbids a suit against an individual or entity who occupies the position of a state office--even if there is no fiscal impact on state funds--just as if the state had been named directly as a the party to the suit.).

If after its analysis the district court finds that a suit against the Wisconsin State Bar is a suit against the State, then unless one of the recognized exceptions to a state's

sovereign immunity applies here,[11] it must dismiss all of Plaintiffs' claims against the Wisconsin State Bar for lack of subject matter jurisdiction.

2. The State Court Justices

Plaintiffs' claims against the Justices of the Wisconsin Supreme Court must be dismissed for jurisdictional reasons. Plaintiffs concede that any prayer for retrospective relief against the Justices "in their official capacity" would lack subject matter jurisdiction.[12] However, the limited jurisdiction of the federal courts not only bars any possible retrospective claims against the Justices, but also mandates that we dismiss Plaintiffs' prayer for injunctive relief because it fails to present an Article III case or controversy.

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[11] For example, while we recognize that a general appearance by an authorized representative of the state may constitute an implied consent to suit under some circumstances, thus waiving the sovereign immunity defense, *see, e.g., Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 635 (1992), the Wisconsin State Bar may not have had the authority to effectuate such an important waiver unilaterally. *See Employees*, 411 U.S. at 285. The Wisconsin Constitution, art. IV, § 27 provides ["t]he legislature shall direct by law in what manner and in what court suits may be brought against the state." In interpreting this language, the Wisconsin Supreme Court has held that "a state agency or officer may not waive the state's sovereign immunity without specific authorization nor will principles of estoppel be applied so as to deprive a state of its sovereign rights. *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). In some circumstances even "the attorney general may appear on behalf of the state . . . without waiving the state's sovereign immunity to suit." Wis. Stat. § 895.46(1)(a) (1983). Whether, under the circumstance of this case the state bar waived any sovereign immunity it may have had is an issue possibly worthy of exploration on remand.

[12] Brief for Appellant at 42, *Crosetto v. State Bar*, No. 92-3899 (7th Cir. 1993). *See also supra* pp. 7-12. Only prospective relief can be sought against the Justices sued in their official capacity. *See Ex Parte Young*, 209 U.S. 123 (1908).

Article III of the Constitution extends the judicial power of the United States only to real cases or controversies. U.S. Const. art. III, § 1. As a result federal courts lack the power to give advisory opinions in hypothetical cases. *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806). Plaintiffs argue that because the Justices might someday enforce the Bar's rules, Plaintiffs have a ripe claim. We disagree. Before a plaintiff may obtain an injunction against a future enforcement he must show some substantial hardship—the enforcement must be certain and the only impediment to the case's ripeness is a delay before its eventual prosecution. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (allowing an injunction against police when the plaintiff or his friends had twice before been arrested for distributing the same handbills at the same shopping center). When pressed by the panel during oral argument Plaintiffs' counsel conceded that he was unaware of any Wisconsin lawyer ever being disciplined by the Justices for that lawyer's failure to pay dues to the integrated bar. In the absence of any real threat of harm resulting from noncompliance with the dues requirement, Plaintiffs' immediate claim is not ripe against the Justices, and must be dismissed for lack of subject matter jurisdiction. Therefore, we affirm the district court's decision to dismiss Plaintiffs' case against the Justices.

B. Qualified Immunity

Federal courts have subject matter jurisdiction over Plaintiffs' claims against Mr. Smay, the Executive Director of the Wisconsin State Bar, sued in his individual capacity for allegedly violating Plaintiffs' First and Fourteenth Amendment rights. 28 U.S.C. § 1331. However, as an individual serving in a state office, Smay may be entitled to qualified immunity. *Abel v. Miller*, 824 F.2d 1522, 1530 (7th Cir. 1987).

The doctrine of qualified immunity "is intended to provide governmental officials with the ability 'to anticipate reasonably when their conduct may give rise to liability

for damages.' " *Id.* at 1533 (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1989)). In *Harlow v. Fitzgerald*, the Supreme Court explained that defendants are shielded from liability by the doctrine of qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982); *see also Williams v. Anderson*, 959 F.2d 1411, 1414 (7th Cir. 1992). Where the affirmative defense of qualified immunity is properly raised, "the plaintiff bears the burden of establishing the existence of the allegedly clearly established constitutional right." *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988) (citations omitted). For the qualified immunity defense to fail, "what is required is a 'sufficient consensus,' based on all relevant case law, indicating that the official's conduct was unlawful." *Landstrom v. Illinois Dep't of Children*, 892 F.2d 670, 676 (7th Cir. 1990). Since Smay properly raised this defense, unless Plaintiffs can show that a sufficient consensus clearly established the existence of a violated constitutional right, Smay will receive qualified immunity from Plaintiffs' damage claims.

Plaintiffs have not begun to meet their burden. The constitutional rights allegedly breached by Smay were not clearly established to a sufficient legal consensus at the time of the alleged violation. Far from being clearly established in 1990, *Keller*, 496 U.S. at 1 (which extended the rules of *Hudson*, 475 U.S. 292,[13] to bar associations), represented the first definitive legal statement that mandatory bar dues had the same restrictions on their use as compulsory union dues. *See Schneider v. Colegio*, 917 F.2d 620, 624 (1st Cir. 1990), *cert. denied*, 112 S.Ct. 865 (1992); *see also, supra* notes 9, 12-14 and accompanying text discussing *Keller* and integrated bar dues. As the district

[13] *Hudson* prohibited, as a violation of the First Amendment, a labor union from using union dues for political contributions against union member's will.

court found, before the *Keller* decision "even the basic issue of the applicability of First Amendment protections to lawyers in an integrated bar was open to question." *Crosetto v. State Bar*, No. 88 C 433 C, Mag. Report and Recommendation at 33 (Magis. Ct., N.D. Ill., W. Div., 1992) (hereinafter, "*Magistrate's Report*"). Notably, the California Supreme Court was reversed by the Supreme Court of the United States on this point of law as late as 1990. *See generally, Keller*, 496 U.S. at 1. The doctrine of qualified immunity is designed to relieve public officials from having to predict, at their own financial peril, how judges might decide future close cases. As this circuit has stated, "government employees must obey the law in force at the time but need not predict its evolution". *Greenberg v. Kmento*, 922 F.2d 382, 385 (7th Cir. 1991). Because the law confronting Smay before 1990 did not clearly establish to a sufficient legal consensus that his activities would subject him to any liability, Smay is entitled to qualified immunity for his conduct during this period. We affirm the district court's dismissal of Plaintiffs' damage claims against Smay.

C. Integrated Bar Dues

All that remains of Plaintiffs' case is their prayer for an injunction "to prevent the reintegration of the Wisconsin State Bar under the revised Wisconsin Supreme Court rules and State Bar by-laws governing legislative activities." *Magistrate's Report* at 40. After considering the merits of Plaintiffs' argument, the district court concluded that the Wisconsin rules and by-laws[14] readily met the requirements established by the Supreme Court in *Keller* and therefore denied Plaintiffs' motion. We agree.

Plaintiffs assert that the compulsory dues plan set out in the State Bar's bylaws and the Wisconsin Supreme Court's

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[14] *See supra* note 3 and accompanying text discussing SCR 10.03(b) and State Bar Bylaws.

rules is facially invalid for failing to comply with *Keller* (which expanded *Hudson* to the arena of state bar associations).[15] However, as noted by the district court, the requirements of *Keller* and *Hudson* were the foundation on which the Wisconsin rules were promulgated. *See Magistrate's Report* at 40. The language of Wisconsin's SCR 10.03(5)(b) follows the language of *Keller* in defining what activities may be funded with compulsory dues.[16] Finally, as the district court found, the new Wisconsin rules and by-laws seem to incorporate all the *Hudson* procedural requirements.[17] In *Hudson*, the Supreme Court held that in order to protect the rights of dissenting union employees, a union collecting a fair-share or agency fee must provide procedural safeguards to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302. The Court went on to state that such procedures must include "an adequate explanation of the basis of the fee, a reasonable

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[15] *See supra* note 9 discussing *Keller*. The *Keller* decision singularly rejected the notion that the "[s]tate [b]ar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority," 496 U.S. at 7, and did not represent any type of implicit recognition that the Eleventh Amendment (or the *Hans* doctrine) is inapplicable to suits against state bar associations when the Court reversed a case arising from the California Supreme Court. *Keller*, 496 U.S. at 17; *see also generally Bates*, 433 U.S. 350.

[16] In *Keller* the Supreme Court opined that "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State", which compares closely to the language from SRC 10.03(5)(b), "[t]he state bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar."

[17] *See supra* note 3 and accompanying text.

prompt opportunity to challenge the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310. As the district court found in *Crosetto*, each of these requirements is included in the in the new Wisconsin procedure. *Magistrate's Report* at 37-44.

The Wisconsin rules follow the law of *Keller* and *Hudson* in the following ways: (1) SCR 10.03(5)(b)(2) requires that the Bar provide written notice to all members before the beginning of each fiscal year, describing those activities the Bar has determined are chargeable and those which are non-chargeable, informing members as to the cost of those activities and describing how those amounts were calculated; (2) SCR 10.03(5)(b)(3)-(5) sets up a procedure whereby those who contend that the calculation is incorrect may challenge the calculation and have their challenge promptly determined by an impartial arbitrator; (3) State Bar Bylaws Article 1, Section 5(b) provides that a member demanding arbitration need not pay any dues until October 31 or 15 days following the arbitrator's decision, whichever is later. Therefore because Plaintiffs have failed to identify any defect in the Wisconsin Bar's compulsory dues plan, we hold this plan constitutional both facially and as applied, and thus affirm the district court's denial of Plaintiffs' motion for injunctive relief.

III. Conclusion

For the foregoing reasons we affirm that part of the district court's judgment to dispose of Plaintiffs' suit against the Justices of the Supreme Court and defendant Smay, vacating in part and remanding this case back to the district court for a factual determination of the status of Plaintiffs' suit with respect to the state.

AFFIRMED in part,
VACATED in part,
and REMANDED.

No. 92-3899 19

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APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	Stanley J. Roszkowski	Sitting Judge if Other Than Assigned Judge	
Case Number	88 C 433	Date	10-22-92
Case Title	Crosetto v. State Bar of Wisconsin		

(In the following box (a) indicate the party filing the motion, e.g., plaintiff,defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.)

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "MOTION" box above]

(2) ☐ Brief in support of motion due _____

(3) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(4) ☐ Ruling/Hearing on _____ set for _____ at _____

(5) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(6) ☐ Pretrial conf. ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(7) ☐ Trial ☐ Set for ☐ re-set for _____ at _____

(8) ☐ Bench Trial ☐ Jury Trial ☐ Hearing held and continued to _____ at _____

(9) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to

☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution)

☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(10) [X] [Other docket entry]

Having considered the entire record in this matter as well as the Magistrate Judge's report and recommendation and Plaintiffs' objections thereto and having been involved in this case for over three years, the court adopts the Magistrate Judge's recommendation that Defendants' motion for summary judgment be granted and Plaintiffs' second motion for a preliminary injunction be denied. All other pending motions are rendered moot. This cause of action is hereby dismissed.

Stanley J. Roszkowski, J. /s/

(11) [ ] [For further detail see [ ] order on the reverse of [ ] order attached to the original minute order form.]

[ ] No notices required, advised in open court.			number of notices
[ ] No notices required.			date docketed
[ ] Notices mailed by judge's staff.			docketing dpty. initials
[ ] Notified counsel by telephone.			date mailed notice
[X] Docketing to mail notices.			mailing dpty. initials
[ ] Mail AO 450 form.			
[ ] Copy to judge/magistrate Judge.			
amd — courtroom deputy's initials	Date/time received in central Clerk's Office		

Document #

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

JOHN CROSETTO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 88 C 433 C
	)	
STATE BAR OF WISCONSIN and STEPHEN L. SMAY,	)	
	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Before the court are assorted motions (twelve to be exact) in various stages of briefing. The district court has referred this case to the Magistrate Judge for a report and recommendation. For the reasons set forth herein, it is the report and recommendation of the Magistrate that Defendants' motion for summary judgment be granted and Plaintiffs' second motion for a preliminary injunction be denied. All others matters are, therefore, rendered moot.

BACKGROUND

Plaintiffs, John Crosetto, Kenneth J. Doran, Scott N. Herrick and Douglas W. Kammer, are attorneys licensed to practice law in the State of Wisconsin. Defendant, the State Bar of Wisconsin, is an association of lawyers headquartered in Madison, Wisconsin. Defendant, Stephen L. Smay, is the Executive Director of the State Bar of Wisconsin. Plaintiffs filed suit in the United States District Court, Western District of

Wisconsin on May 19, 1988 seeking declaratory and injunctive relief as well as monetary and punitive damages for alleged violations of 42 U.S.C. § 1983. Plaintiffs allegations will be set out more fully below.

On June 15, 1989 this case of action was ordered reassigned to a District Court Judge who was not sitting in Wisconsin and who had no membership ties to the Wisconsin State Bar Association. Hence, this case was reassigned to this court on June 22, 1989. Jurisdiction of this court is based upon 42 U.S.C. § 1983 and 28 U.S.C. § 1443(a)(3). In February of 1991, both the District Court Judge and the Magistrate informed the parties to this cause of action that the Local Rules of the Northern District of Illinois would apply in this case.

The court notes initially that Plaintiffs have failed to file a Local Rule 12(n) response to Defendants' Local Rule 12(m) statement of facts. Under Rule 12(n), a party opposing a motion for summary judgment must "state separately and with supporting documentation his disagreement with any factual assertions in the [moving party's statement of facts] on pain of having the asserted facts deemed admitted." *Maksym v. Loesch*, 937 F.2d 1237, 1240 (7th Cir. 1991); *Cooper v. Lane*, No. 90-2013 (7th Cir. July 22, 1992). Nevertheless, in order to dispose of this case that has generated innumerable documents and has taken this court's time for over three years, the court will overlook Plaintiffs' failing and proceed to the merits of the case. In doing so, the court will try and work with Plaintiffs' somewhat jumbled statement of facts set forth in Plaintiffs' response to Defendants' motion for summary judgment as well as with Defendants' Local Rule 12(m) statement and Defendants' brief in support of their motion for summary judgment.

In 1943, the Wisconsin legislature enacted a bill directing that there "shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in [Wisconsin], and membership in the association [was to] be a condition precedent to the right to practice law in Wisconsin." Ch. 315, 1943 Wis. Laws (codified as Wis. Stat. § 256.31

(1943)). The Wisconsin Supreme Court construed the statute as an advisory legislative declaration that integration of the Bar would promote the general welfare of the State. *Integration of Bar Case*, 11 N.W.2d 604 (1943).[1] The court acknowledged its authority and responsibility to regulate the practice of law in the State and its discretionary power as to both the time and form of integration. The court nevertheless deferred the decision to integrate.

Three years later, in a short opinion, the Wisconsin Supreme Court again declined to integrate the Bar. The court intimated that the objectives sought to be obtained by integration could be attained by an adequately supported voluntary association. As such, the court urged the support of the voluntary association by individual members of the Bar. *In re Integration of the Bar*, 25 N.W.2d 500 (1946).

Ten years passed. The Wisconsin Supreme Court once again reviewed its decision regarding integration in *In the Matter of the Integration of the Bar*, 77 N.W.2d 602 (1956). The court noted that "too many lawyers have refrained or refused to join [the voluntary association], that membership in the voluntary association has become static, and that a substantial minority of the lawyers in the state are not associated with the State Bar Association." *Id.* at 603. Accordingly, following a review of the merits of integration, the court ordered integration of the Bar on an interim basis. *Id.* at 604.

After a "two-year trial period", the Wisconsin Supreme Court made the integrated State Bar "permanent". *In re Integration of the Bar*, 93 N.W.2d 601 (1958). In reaching this result, the court noted that "[u]nder integration the State Bar has increased its services to the lawyers of this state, promoted the high standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice." *Id.* at 602. In answer to the suggestion that

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[1] An "integrated bar" is "an association of attorneys in which membership and dues are required as a condition of practicing law" in a State. *Keller v. State Bar of California*, ___ U.S.___, 110 S. Ct. 2228, 2229 (1990).

integration of the Bar was undemocratic, the court observed:

> It is not undemocratic to require those who are privileged to practice law and are entrusted with the duty to secure or protect the property, rights and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group and to increase the effectiveness of their service to the public. The integrated Bar has been defined as "the process by which every member of the Bar is given an opportunity to do his share in carrying out the public service of the Bar and obliged to bear his portion of the responsibility." Most objections have centered around the obligation to bear a portion of their responsibility. In the nature of things every privilege has a correlative obligation.

Id. at 603.

In 1960, the Wisconsin Supreme Court had occasion to review the constitutionality of the integrated State Bar. In *Lathrop v. Donohue*, 102 N.W.2d 404 (1960), the court upheld the Bar's constitutionality explaining that "[t]he only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process." *Id.* at 408. The court recognized that "the State Bar is a public and not a private agency." *Id.* at 411. As such, the court found that the integration rule and the by-laws of the State Bar "do not compel the plaintiff to associate with anyone[,] ... [t]he only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues ..." *Id.* at 408. The court explained that "the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation." *Id.* Finally, noting the benefits of the integrated Bar, including its function of "securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting

the administration of justice and the practice of law," the court determined that an integrated Bar promotes the public interest in a way that "far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues." *Id.* at 409, 411.

The United States Supreme Court reviewed the Wisconsin Supreme Court's decision. In *Lathrop v. Donohue*, 367 U.S. 820 (1961), the U.S. Supreme Court upheld the mandatory membership requirement. In so doing, the Court stated:

> Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

Id. at 843 (plurality opinion) (footnote omitted).

A plurality of the Court (Justices Brennan, Clark, Stewart and Chief Justice Warren), however, found the record inadequate to decide the narrower issue of whether certain of the Bar's "political" activities violated the plaintiff's First Amendment rights. Three Justices (Harlan, Frankfurter and Whittaker) concurred in the result, but rejected the notion that mandatory bar dues, even if used on legislative matters, could ever constitute a violation of a dissenting Bar member's constitutional rights. In fact, Justice Harlan, joined by Justice Frankfurter, wrote:

> I can only regard as entirely gratuitous a contention that there is anything less than a most substantial state interest in Wisconsin having the views of the members of its Bar "on measures directly affecting the administration of justice and the practice of law."

Id. at 864 (Harlan, J., concurring).

Since *Lathrop*, the structure, purposes and activities of the Wisconsin State Bar have undergone repeated review by the Wisconsin Supreme Court and by special committees the court appointed for the purpose of review. In July of 1976, for example, the Wisconsin Supreme Court appointed a committee, chaired by Judge Andrew Parnell (hereinafter "the Parnell Committee"), to study and report on the Bar's activities and on the question of whether to continue integration of the Bar. The Parnell Committee submitted its findings and report to the Wisconsin Supreme Court.

The Wisconsin Supreme Court delivered its opinion on the Parnell Committee's report in *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1978). The court agreed with the Committee's reasons for recommending continuation of the integrated Bar, namely: "(1) mandatory membership and dues give the best assurance that the Bar will have the resources necessary to carry out its programs and (2) each attorney has an individual obligation to support the bar in fulfilling its collective responsibilities to society, and the unified Bar is the best means to accomplish this." *Id.* at xxxvi. Commenting on the Parnell Committee resolutions, the court expressed approval of the Bar's legislative activities, including "traditional lobbying." *Id.* The court, however, advised the State Bar to bring "major issues of legislative policy" before the membership at annual and midwinter meetings, whenever possible. Finally, recognizing the presence of "issues raised in *Lathrop*," the court delineated the Bar's authority in legislative activities to include "matters concerning the administration of justice and the practice of law, including matters of substantive law on which the views of lawyers have special relevance. The guiding princip[le] ... must

always be the public interest." *Id.* at xxxix–xi.

In 1979, in the case of *State ex rel. Armstrong v. Board of Governors*, 273 N.W.2d 356 (1979), certain State Bar members requested a referendum on continued integration. The Wisconsin Supreme Court rejected this request and reaffirmed its exclusive authority over the matter of integration of the Bar.

The Wisconsin Supreme Court again addressed the issue of the integrated Bar in *In the Matter of the Discontinuation of the State Bar of Wisconsin as an Integrated Bar*, 286 N.W.2d 601 (1980). Oral argument was held on this matter and several State Bar members appeared and argued against continued integration. Following oral argument, the court again reaffirmed its approval of the Bar's activities and rejected the petitioners' request to make the State Bar of Wisconsin voluntary.

The court did, however, express hesitance about the State Bar's involvement with the Wisconsin Lawyers Political Action Committee (hereinafter "LAWPAC"). LAWPAC was a separately formed political action committee that permitted members of the State Bar to voluntarily contribute financially in order to express political views. *Id.* at 602 (noting that LAWPAC was "organized as a voluntary, non-profit, unincorporated political association ... not supported by State Bar membership dues"). The court ordered that a second committee be formed in order to study the propriety of mandatory membership, whether the Bar's involvement with LAWPAC was permissible and the possible alternatives to the integrated bar. *Id.* at 603. The committee, chaired by Attorney John Kelly (hereinafter "the Kelly Committee"), submitted its report to the Wisconsin Supreme Court on October 1, 1982.

Following a public hearing on the Kelly Committee's report, the court, for a third time, reaffirmed its commitment to the integration of the Wisconsin State Bar. *Report of Committee to Review the State Bar*, 334 N.W.2d 544 (1983). The Wisconsin Supreme Court explained that mandatory support of the Bar's public purposes is proper and that the unified Bar is "better suited than a voluntary bar to accomplish [these public purposes]." *Id.* at 546. The court stated that "it is our opinion,

as it has been for more than 25 years, that a bar association in which membership is mandatory is the best means for the profession to fulfill its obligations to the public." *Id.* at 546–547. Accordingly, the court rejected the proposal of a voluntary bar as not a "practicable alternative." *Id.*

In relation to the Bar's legislative activities, the Wisconsin Supreme Court reiterated its approval of the Parnell Committee resolutions. The court declined to require that the Board of Governors obtain a specified percentage of membership support prior to taking a position on particular legislation. The court deemed it preferable that the Board attempt to determine the composite judgment of the members of the Bar. *Id.* at 547–48.

The court did, however, order that the Bar disassociate itself from LAWPAC and ordered the State Bar to institute a system of rebates for State Bar lobbying activities. In so doing, the Wisconsin Supreme Court approved the concept of a dues rebate procedure for those members dissenting from legislative positions taken by the State Bar. The court considered the rebate procedure to be "an acceptable and adequate response to any claimed infringement on the rights of those association members who oppose the association's position on specific legislation." *Id.* at 548. The court did recognize that the Bar's involvement in the legislative arena raised the specter of potential infringement of an individual attorney's constitutional rights. The court, however, did not find that any infringement had, in fact, occurred. The rebate procedure was simply viewed as a preventive measure. *Id.* at 548.

The Wisconsin Supreme Court did not specify how the rebate procedure was to be implemented. Instead, the court ordered public hearings to be held on the matter, the first of which was held on September 17, 1984. *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5)*, slip op. (Wis. Sup. Ct. Jan. 21, 1986). On February 28, 1985, the court ordered the Bar to consider four alternative rebate plans. An additional hearing was then held on May 23, 1985. *Id.* Ultimately, the court adopted a "dues reduction" plan that permitted objectors to deduct their pro rata share of Bar dues expended for legislative

activities at the outset of each fiscal year. *Id.* Such a plan was thought to be consistent with the United States Supreme Court's decision in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984).

Wisconsin Supreme Court Rule 10.03(5)(b) became effective July 1, 1986 and provided as follows:

> 1. In this paragraph, "legislative activities" means activities intended to advocate a position of the state bar with respect to contemplated, pending or existing legislation. "Legislative activities" does not include the review and analysis of contemplated, pending or existing legislation not intended to influence that legislation.
> 2. Prior to the beginning of each fiscal year, the state bar shall establish, as a part of its annual budget for that year, a budget specifically for legislative activities for that year and shall set forth in the dues statement it sends to its members for that year each member's pro rata portion, according to class of membership, of the amount budgeted for legislative activities.
> 3. A member of the state bar may deduct from the mandatory dues payable for each fiscal year the member's pro rata portion of the amount budgeted for legislative activities, and the state bar's established budget for legislative activities for each fiscal year shall be reduced by the total amount of mandatory dues deducted by members for that year.
> 4. A member of the state bar not required to pay dues shall be given the opportunity at the beginning of each fiscal year to indicate on a form supplied by the state bar whether or not the member approves of the state bar's legislative activities for that year.

On April 19, 1986, in response to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the State Bar's Board of Governors also passed a by-law providing for an arbitration proceeding in the event a dispute arose between the

Bar and a member concerning the allocation of expenditures to "legislative activities" as defined under the above cited Supreme Court Rule. This procedure was approved by the Wisconsin Supreme Court in *Petition to Review State Bar Bylaw Amendments*, 407 N.W.2d 923 (1987). Although a number of State Bar members opposed such a proceeding, the court found that the State Bar by-law established a mechanism to resolve any dispute with respect to the calculation of dues reductions for "legislative activities" under the Supreme Court Rule. As such, the arbitration proceeding satisfied the constitutional requirements set forth in *Chicago Teachers Union v. Hudson*. *Id.* at 925–927.

In 1988, United States District Court Judge Barbara Crabb declared unconstitutional the Wisconsin Supreme Court Rule that required membership in the State Bar of Wisconsin as a condition of the right to practice law in that State. Judge Crabb held that the membership requirement violated the First Amendment to the United States Constitution. *Levine v. Supreme Court of Wisconsin*, 679 F.Supp. 1478 (W.D. Wis. 1988). In the wake of Judge Crabb's decision in *Levine*, the Wisconsin Supreme Court suspended enforcement of the mandatory membership rule on May 26, 1988.

The Seventh Circuit Court of Appeals subsequently reversed Judge Crabb's decision. *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 204 (1989). The Seventh Circuit specifically rejected Judge Crabb's conclusion that the United States Supreme Court's decision in *Lathrop v. Donohue*, 367 U.S. 820 (1961), was no longer controlling on the issue of the constitutionality of Wisconsin's integrated Bar rule. As such, the Seventh Circuit remanded the case to the district court for further proceedings. Nevertheless, suspension of the mandatory membership requirement for the Wisconsin State Bar remained in effect.

On the same day that certiorari in *Levine* was denied, the United States Supreme Court granted a petition for certiorari in *Keller v. State Bar of California*, ___ U.S. ___, 110 S. Ct. 46 (1989). In *Keller*, the plaintiffs challenged the expenditure by

the California Bar of mandatory Bar dues for political and ideological activities, including lobbying, amicus curiae briefs and election campaign activities. The California Supreme Court had held that, as a governmental agency, the California Bar could use funds derived from mandatory dues for any activity within its statutory authority without infringing the plaintiffs' First Amendment rights. *Keller v. State Bar of California*, 767 P.2d 1020, 1030 (1989).

On June 4, 1990, the United State Supreme Court issued its decision in *Keller*, ___ U.S. ___, 110 S. Ct. 2228 (1990). Citing *Lathrop*, the Court reaffirmed the Constitutionality of the integrated Bar. *Id.* at 2232–33. The Court then held that the analysis set forth in its union and agency shop cases (*e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)[2]) applied to integrated Bars. *Id.* at 2235–38. The Court ruled that an integrated Bar may "constitutionally fund activities germane to [the] goals [of regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside those areas of activity." *Id.* 110 S. Ct. at 2236. Finally, the Court noted that "an integrated bar could certainly meet its *Abood* obligation [not to fund non-germane ideological activities with mandatory dues] by adopting the sort of procedures described in [*Chicago Teachers Union, Local No. 1 v.] Hudson*[, 475 U.S. 292 (1986)]." *Id.* 110 S. Ct. at 2237.

Following the *Keller* decision, Judge Crabb dismissed the *Levine* case, which had been stayed pending the U.S. Supreme

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[2]*Abood* held that while the Constitution did not prohibit a union from spending "funds for the expression of political views ... or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative", the Constitution did require that such expenditures be "financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of governmental employment." 431 U.S. a 235–236.

Court's ruling in *Keller*, by granting the Wisconsin State Bar's motion for summary judgment. Judge Crabb reasoned that the plaintiffs' claims in *Levine*, which by that time concerned only claims for prospective relief, were not ripe for decision. This was so because the State Bar had been voluntary since shortly after the original decision in *Levine* and because any rebate procedure that may be put into effect if the State Bar returned to mandatory status would probably be unobjectionable. *Levine v. Heffernan*, No. 86-C-578-C (W.D. Wis. Feb. 21, 1991).

On September 14, 1990, the Board of Governors of the Wisconsin State Bar approved a process that would result in a petition to the Wisconsin Supreme Court concerning the Bar's status. Two committees were appointed, each charged with preparing a draft petition for review by the Board of Governors. One committee was to prepare a petition seeking to amend Supreme Court Rules and State by-laws to make the State Bar a voluntary organization; the other to reinstate the State Bar as a mandatory organization.

On March 22, 1991, the State Bar's Board of Governors voted to petition the Wisconsin Supreme Court to return the Bar to mandatory status and directed that a petition be prepared consistent with *Keller*. Following a public hearing in this matter on March 13, 1992, the Wisconsin Supreme Court reestablished the mandatory Bar effective July 1, 1992 under a set of newly-issued Wisconsin Supreme Court rules and State Bar by-laws. During the public hearing, an overwhelming majority of those who spoke did so in favor of reintegration. Only one person spoke in opposition to the petition.

The newly enacted Wisconsin Supreme Court Rule 10.03(5)(b) provides as follows:

> 1. The State Bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the State Bar. Other activities must be supported by voluntary dues, user fees or other sources of revenue.

2. Prior to the beginning of each fiscal year, the State Bar shall publish written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues. The notice shall indicate the cost of each activity including all appropriate indirect expense and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata portion, according to the class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues. The notice shall be sent to every member of the State Bar along with the annual dues notice. A member of the State Bar may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues.

3. A member of the State Bar who contends that the State Bar incorrectly set the amount of dues that can be withheld may deliver to the State Bar a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the member's dues statement.

4. If one or more timely demands for arbitration are delivered, the State Bar shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the State Bar.

5. In the event the decision of the arbitrator results in a higher pro rata reduction of dues for members who have delivered timely demands for arbitration for a fiscal year, the State Bar shall offer such higher pro rata reduction for members first admitted to the State Bar during that fiscal year and after the date of the arbitrator's decision.

In returning to the mandatory Bar, the Board of Governors affirmed an arbitration by-law that had been proposed with the new rules presented to the Wisconsin Supreme Court. The State Bar's Executive Committee also adopted principles to guide the Bar in identifying chargeable and non-chargeable expenditures.

On June 12, 1992, the dues statements for fiscal year 1993 were sent to members. The amount of dues reduction was determined by the State Bar to be $2.21 for each full dues-paying member. Nevertheless, the Executive Director recommended, and the Board of Governors adopted, a $5.00 dues reduction in order to alleviate any errors in making the chargeable/non-chargeable determination. Included with the statements was a six page notice describing the new rules, the calculation of the dues reduction amount and the procedure for challenging the calculation.

PENDING MOTIONS

Various motions are currently pending before this court. Included in these motions are: Plaintiffs' motion to vacate order denying class certification; Plaintiffs' motion to strike insufficient defenses; Plaintiffs' motion for a preliminary injunction; Defendants' motion for summary judgment; Plaintiffs' motion for declaratory ruling; Plaintiffs' motion to reopen discovery; Plaintiffs' motion for production of documents; Plaintiffs' motion for sanctions; Defendants' motion for sanctions; Plaintiffs' second motion for sanctions; Plaintiffs' second motion for a preliminary injunction; and Plaintiffs' motion to amend the pretrial order. As Defendants' motion for summary judgment is dispositive of the issues in this case, the Magistrate Judge will take up this motion first.

DISCUSSION

This court will not grant any summary judgment motion unless all of the pleadings and supporting documents, if any, indicate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986); *Fitzsimmons v. Best*, 528 F.2d 692, 694 (7th Cir. 1976). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-

moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The district court, however, is not required to evaluate every conceivable inference that can be drawn from evidentiary matters, but only reasonable ones. *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975, 980 (7th Cir. 1984).

The party seeking summary judgment bears the initial burden of establishing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Dowden v. Polymer Raymond, Inc.*, No. 91-2894 (7th Cir. July 14, 1992). Once the moving party has supported its motion, the non-moving party has the responsibility of going beyond the pleadings and setting forth specific facts demonstrating the existence of a genuine issue of fact for trial. *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 392 (7th Cir. 1990). "A material fact must be 'outcome determinative under the governing law.'" *Id., quoting, Shlay v. Montgomery*, 802 F.2d 918, 920 (7th Cir. 1986). Furthermore, a party opposing a motion for summary judgment must do more than simply show that there is some "metaphysical doubt" as to the material fact(s). *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

I. Damages

Defendants characterize Plaintiffs' complaint as "a rambling, disjointed attack on virtually all State Bar activities since 1978." Indeed, even Judge Crabb described Plaintiffs' complaint as "somewhat prolix and disjointed". Judge Crabb, however, attempted to summarize Plaintiffs' claims as follows:

> [T]hat their First Amendment rights have been violated by Wisconsin's requirement that they belong to the State Bar if they wish to practice law in the state, by the State Bar's refusal prior to 1986 to refund to members that portion of their membership dues that were used for the State Bar's legislative activities, and by the State Bar's refusal since 1986 to refund to members that portion of their

membership dues that are used for "technical" legislative expenses.[3]

Plaintiffs seek, in part, "out-of-pocket compensatory damages of about $500,000" allegedly spent on "legislative activities" from August 12, 1980 to the present and punitive damages of $600,000 for alleged reckless disregard of Plaintiffs' first Amendment rights. Defendants assert the defense of qualified immunity in relation to these allegations and claims for damages.

The issue as to whether a defendant is entitled to qualified immunity is a legal issue to be decided by the court and not by a jury. *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9, 530 (1985). "[A] court considering a motion for summary judgment based on qualified immunity has before it a pure question of law: whether, based on all the undisputed facts, the defendant's conduct violated any clearly established constitutional or statutory right." *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987).

As explained in the United States Supreme Court case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), two types of immunity defenses exist. First, there is the defense of "absolute immunity" that is available to those officials whose special functions or constitutional status requires complete protection from suit. *Id.* at 807. The second type of immunity defense is "qualified immunity" which exists for executive officials in general. This type of immunity reflects an attempt to balance competing values; namely, "the importance of a damages remedy to protect the rights of citizens" and the need to "protect officials who are required to exercise their discretionary functions," including the "related public interest in encouraging the vigorous exercise of official authority." *Id.* Qualified immunity is the norm. *Id.* The presumption is that qualified rather than

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[3]Although Plaintiffs have now been granted leave to file four amended complaints since Judge Crabb's description of Plaintiffs' allegations, the Magistrate believes Judge Crabb's summary is still apropos.

absolute immunity is sufficient to protect government officials in the exercise of their duties. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991).

The defense of qualified immunity is available to public officials. *Abel v. Miller*, 824 F.2d 1522, 1530 (7th Cir. 1987). The defense is intended to provide public officials with the ability to "reasonably anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). The doctrine of qualified immunity extends to individuals as well as to the institutions for whom these individuals work. *Abel v. Miller*, 824 F.2d 1522, 1530 (7th Cir. 1987). In *Werle v. Rhode Island Bar Ass'n*, 755 F.2d 195 (1st Cir. 1985), the First Circuit Appellate Court held that the defense of qualified immunity is available to a Bar Association.

Qualified immunity has two prongs. First, is the objective prong and it involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). Second, is the subjective prong and it involves "permissible intentions." *Id.* The U.S. Supreme Court has defined these prongs by identifying the circumstances in which qualified immunity would not be available. The Court has held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiffs], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury ...." *Id.*

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court explained that defendants in a § 1983 lawsuit "are shielded from liability" by the doctrine of qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Accordingly, where the defense of qualified immunity is properly raised, the plaintiff "bears the burden of establishing the existence of the allegedly clearly established constitutional right." *Rakovich v. Wade*, 850 F.2d

1180, 1209 (7th Cir.), *cert. denied*, 488 U.S. 968 (1988).

The *Harlow* Court, however, did not explain what it meant by the phrase "clearly established statutory or constitutional rights". *Benson v. Allphin*, 786 F.2d 268, 275 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986). Subsequent U.S. Supreme Court and Seventh Circuit decisions have, however, interpreted the meaning of that phrase. In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Supreme Court explained that the cases construing *Harlow* "establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." In other words, "in light of pre-existing law the unlawfulness must be apparent." *Id.* As pointedly stated by the Supreme Court in *Malley v. Briggs*, 475 U.S. 335, 341 (1986), the defense of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."

The Seventh Circuit Court of Appeals has articulated what a plaintiff must demonstrate in order to prove that his rights were "clearly established." "While cases involving the exact fact pattern" are unnecessary, *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986), "what is required is a 'sufficient consensus,' based on all relevant case law, 'indicating that the official's conduct was unlawful.'" *Landstrom v. Illinois Dep't of Children & Family Serv.*, 892 F.2d 670, 676 (7th Cir. 1990) (citation omitted).

The Magistrate is of the opinion that Defendants violated no clearly established First Amendment rights. The alleged constitutional rights that Plaintiffs allege were violated were not clearly established prior to the State Bar's suspension of the mandatory bar rule on July 1, 1988. In fact, prior to the U.S. Supreme Court's decision in *Keller v. State Bar of California*, even the basic issue of the applicability of the First Amendment to lawyers in an integrated bar was open to question. Prior to

Keller, *Lathrop* was "the last Supreme Court decision squarely to address the [F]irst [A]mendment rights of lawyers in an integrated bar." *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986), *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 663 (1991). The *Lathrop* Court upheld the mandatory membership requirement but expressly declined to consider whether the First Amendment might be implicated by an integrated bar's use of mandatory dues to support its legislative program. Accordingly, the U.S. Supreme Court "establish[ed] for the first time [in *Keller*] that the principles it previously had developed for the permissible use of compulsory union dues are equally applicable for the use of mandatory bar dues." *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 624 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 865 (1992) (emphasis added).[4]

Plaintiffs assert that Defendants have lost any claim they may have to qualified immunity by "deliberately flaunting" the express commands of the Wisconsin Supreme Court that they not engage in any political activity such as LAWPAC. Plaintiffs contend that, despite the court's admonitions, Defendants controlled and ran LAWPAC from their offices, forced Plaintiffs to support LAWPAC, tried to conceal their relationship to LAWPAC and deliberately misrepresented to the Wisconsin Supreme Court that they had severed all ties to LAWPAC.

Defendants have provided this court with the affidavit of Defendant Stephen L. Smay stating that Defendants severed all ties with LAWPAC in 1983. Plaintiffs have attempted to contradict Defendants' assertion by supplying the court with a copy of a memorandum dated July 19, 1983 from Defendant Smay to the State Bar's Executive Committee indicating that the State Bar had contacted LAWPAC about a contribution on

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[4]Plaintiffs themselves admit that in *Keller* the U.S. Supreme Court, "for the first time ... squarely ruled that unified bar associations act unlawfully when they force their members to financially support certain legislative activities ... " Plaintiffs' brief in opposition to Defendants' motion for summary judgment, pg. 42.

behalf of a lobbyist and was advised no contribution could be made. Plaintiffs have also supplied the court with copies of some bank statements indicating that LAWPAC's bank statements still reflected the State Bar address through January 1, 1985.

The Magistrate finds that Plaintiffs submissions do not negate Defendants' qualified immunity defense by showing, in essence, a lack of good faith on the part of Defendants. The memorandum was simply Defendant Smay's response to the Executive Committee's inquiry as to the feasibility of a LAWPAC contribution. Defendant Smay informed the Executive Committee that such a contribution was beyond LAWPAC's authority. Defendant Smay further offered to meet with the members of the Executive Committee in order to determine if this matter should be on the Board agenda or if the "issue of extraordinary majority vote requirements on legislative issues" should be discussed prior to "becoming ensnarled in the specifics of any one issue." As to the bank statements with LAWPAC's address listed as the Wisconsin State Bar's office, the court notes that these statements reflect no activity on the accounts whatsoever from January of 1984 to January of 1985.

The Magistrate finds rather, Plaintiffs' submission of a letter from Defendant Smay to Chief Justice Beilfuss of the Wisconsin Supreme Court dated May 20, 1983 and copied to Amedeo Greco, Plaintiffs' attorney, more helpful in resolving the issue of Defendants' good faith. That letter assured the Wisconsin Supreme Court that the State Bar was moving to sever all ties with LAWPAC. The letter pointed out the difficulties in finding alternative administrative sources for LAWPAC, including the removing of files from the State Bar's office and the finding of a new administrator. Defendant Smay stated that "any activity devoted by State Bar staff to LAWPAC is of the minimum maintenance type." Defendant Smay encouraged the court and Mr. Greco to visit with him regarding the difficulties in divesting the State Bar from any tie to LAWPAC. In concluding his letter, Defendant Smay noted that the 1984 dues statement

makes no mention of LAWPAC nor does the statement attempt to collect any contributions for LAWPAC.

The Magistrate believes that this minimum tie to LAWPAC during the early stages of divesting the State Bar from, what was once, an integral part of the Wisconsin State Bar fails to establish any lack of objective good faith on Defendants' part. This cause of action has undergone four years of discovery. In that time Plaintiffs have failed to come forward with any, what the Magistrate considers to be, real evidence of an actual, continuing relationship between LAWPAC and the Wisconsin State Bar. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Valentine v. Joliet Township High School Dist. No. 204*, 802 F.2d 981, 986 (7th Cir. 1986) (citation omitted).

Plaintiffs also are critical of the timekeeping records maintained by the State Bar for LAWPAC activities. Plaintiffs assert that these records should have been more detailed and should have been maintained on a daily basis.[5] Plaintiffs further contend that the State Bar's records were not adequately audited. The Magistrate finds that Plaintiffs' allegations are not supported by the record. See, e.g., Defendants' Appendix to its brief in support of its motion for summary judgment, Tab 16, pgs. 4, 16, 22; Tab 17, pgs. 4, 16, 22 (reflecting verified auditors' reports for relevant fiscal years, including legislative advocacy and assistance records); Defendant Smay's Deposition of April 8, 1991 (a deposition the Magistrate personally supervised for approximately six hours);

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[5]The records were kept on a monthly basis.

Edgar Lien's Deposition of August 30, 1989; Edgar Lien's Deposition of April 1992.

In any event, even if Plaintiffs' allegations with regard to Defendants' legislative activities were taken as true, the activities occurred before *Keller* clearly established that the First Amendment restricted an integrated bar's use of mandatory dues. Accordingly, it is the report and recommendation of the Magistrate that Defendants' motion for summary judgment as to Plaintiffs' claims for compensatory and punitive damages be granted based upon qualified immunity.[6]

II. Prospective Relief

The parties to this cause of action have informed the court that the Wisconsin State Bar has now, as of July 1, 1992, returned to a mandatory bar status. The law is clear that a mandatory bar, in and of itself, does not impermissible infringe upon Plaintiffs' constitutional rights. *Keller v. State Bar of California*, ___ U.S. ___, 110 S. Ct. 2228, 2233–34 (1990); *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961); "[L]awyers admitted to practice in the State may be required to join and pay dues to the State Bar." *Keller*, 110 S. Ct. at 2231. Rather, it is the use of the compelled dues of objecting members for ideological activities not germane to regulation of the legal profession or improving the quality of legal services that raises First Amendment concerns. *Keller*, 110 S. Ct. at 2236. Accordingly, the question before the court becomes the adequacy of the procedure put in place in order to prevent such a use of mandatory dues. *Keller*, 110 S. Ct. at 2237.

The United States Supreme Court in *Keller* applied the analysis of its union and agency shop cases to the expenditure

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[6]The Magistrate notes that Plaintiffs have also failed to show that Defendants' conduct warrants the imposition of punitive damages. "A jury may award punitive damages in § 1983 if it finds conduct motivated by evil intent or callous indifference to the federally-protected rights of plaintiffs." *Coulter v Vitale*, 882 F.2d 1286, 1289 (7th Cir. 1989) (citation omitted). The record in this case does not support such a finding.

of mandatory dues in the integrated bar context.[7] The Court held that an integrated bar may collect dues from objecting members for the support of ideological causes not germane to regulation of the legal profession or improving the quality of legal services. *Id.* at 2236. The Court acknowledged the difficulty in applying this standard[8] and, as such, indicated that an integrated bar can meet its obligation by adopting the type

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[7]The *Keller* Court noted the "substantial analogy" between the relationship of the State Bar and its members, on the one hand, and the relation of the employee unions and their members, on the other. The Court explained that the reason behind "agency shop" laws is to prevent "free riders"--those individuals who receive the benefits of union negotiation during collective bargaining with their employers, but who do not chose to join the union and pay dues. "Free riders" avoid paying their fair share of the cost of a process that benefits them. State Bar members, on the other hand, concededly do not benefit as directly from State Bar activities as do union members, but "the position of the organized bars has generally been that they prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession." The Court concluded that "[i]t is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." 110 S. Ct. at 2235.

[8]In this regard, the Supreme Court stated:

> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum [Plaintiffs] have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

110 S. Ct. at 2237.

of procedures approved by the Court in the union context.

In *Chicago Teachers Union, Local No. 1 v. Hudson* (hereinafter "*Hudson*"), 475 U.S. 292 (1986), the U.S. Supreme Court set forth the minimum constitutional requirements of a procedure by which union members (or, non-union members in an agency shop) could prevent the use of their compelled union dues to finance the non-germane ideological and political expenditures of a union. The Supreme Court reasoned that in order to protect the rights of dissenting union members, a union operating in an agency shop setting must provide procedural safeguards to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 302. Accordingly, the Supreme Court set forth the following safeguards: (1) an adequate explanation of the fee to potential objectors must be given before collection of the fee; (2) a reasonably prompt decision by an impartial decisionmaker on any objections to the amount of the fee must be provided; and (3) a procedure whereby amounts reasonably in dispute are not used by the union, even temporarily, for an improper purpose must be developed (for example, an escrow account). *Id.* at 305–310. See, also, *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1372 (7th Cir. 1989).

Plaintiffs have filed a second motion for a preliminary injunction apparently seeking to prevent the reintegration of the Wisconsin State Bar under the revised Wisconsin Supreme Court rules and State Bar by-laws governing legislative activities. The Magistrate views it as appropriate to examine these new rules and by-laws in order to determine if they comport with the minimum requirements set forth in *Hudson*.[9]

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[9]The Magistrate is of the belief that this is a more expedient method of resolving the issues in this case as opposed to determining whether Plaintiffs have satisfied the necessary factors for injunctive relief. The chosen method shows that Plaintiffs cannot meet the first requirement for an injunction to issue, that is, likelihood of success on the merits.

The Magistrate initially notes that the language of the new Wisconsin Supreme Court Rule 10.03(5)(b) quotes the language of *Keller* in defining what activities may be funded with compulsory dues. Specifically, the language reads: "The State Bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the State Bar." See, *Keller*, 110 S. Ct. at 2236 ("the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State'") (citation omitted). The Magistrate finds that each of *Hudson's* requirements is included in the new procedure.

A. The procedure provides for an adequate explanation of the amount of mandatory dues.

The U.S. Supreme Court struck down the dues reduction procedure established by the Chicago Teachers Union in *Hudson* because it, *inter alia*, failed to provide potential objectors with sufficient information about how the union arrived at each union member's proportionate share so that each individual member could gauge the propriety of the fee. *Id.* at 306. The notice provided in *Hudson* simply informed each union member of the amount of the fee. No explanation was given as to how that amount had been calculated. *Id.* at 306–307.

Although the U.S. Supreme Court found the minimal notice in *Hudson* inadequate, the Court did state that an exhaustive and detailed list of all expenditures is not required. All that need be provided is a list of the major categories of expenditures with verification by an independent auditor. *Id.* at 307 n.18. Moreover, the Court recognized that "absolute precision" in the calculation of the union's assessment to dissenting members cannot be expected or required. The Court noted that the union could not "be faulted for calculating its fee on the basis of expenses during the preceding year." *Id.*

In contrast to the notice provided in *Hudson*, the Wisconsin Supreme Court procedure requires the State Bar to provide written notice to all members before the beginning of each fiscal year. The notice must describe those activities that the State Bar has determined can be supported by compulsory dues and those activities that cannot be supported by compulsory dues. The notice must also inform the members of the cost of each activity and describe how the costs were calculated. The pro rata portion of each activity that cannot be supported by compulsory dues must be stated. A State Bar member may then withhold his or her pro rata share of the dues budgeted for activities that cannot be supported by compulsory dues.

The Magistrate finds that the information required by the Wisconsin Supreme Court rule in this regard clearly meets the first *Hudson* requirement. Rule 10.03(b)(5)(2) provides details of the activities of the State Bar, each member's pro rata share of each activity and how this share was calculated. The procedure, thus, provides members of the Wisconsin State Bar with sufficient information from which they can gauge the propriety of the pro rata amount. The individual State Bar members may then deduct, if they see fit, the amount for the State Bar's legislative activities that they do not wish to help finance.

B. The procedure provides for a "reasonably prompt" decision on any objections by an impartial decisionmaker.

The procedure struck down in *Hudson* was also inadequate because it failed to provide for an impartial adjudication of any objections. The procedure at issue in *Hudson* provided that any objections would be considered only by union officials and an arbitrator selected solely by the union. 475 U.S. at 308. The U.S. Supreme Court noted that an expeditious arbitration would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker. The arbitrator must not, however, represent the union's unrestricted choice. *Id.* at n.21.

Wisconsin Supreme Court Rule 10.03(5)(b)(3)-(5) sets up a procedure whereby those who contend that the calculation as

to those activities that cannot be supported by compulsory dues or as to their pro rata share is incorrect may challenge the calculation. The procedure then provides that the challenge will be promptly determined by an impartial arbitrator. Accordingly, the Wisconsin procedure also meet the second requirement of *Hudson*.

C. The procedure prevents the use of the dues of objecting members for an improper purpose.

Finally, the U.S. Supreme Court struck down the procedure in *Hudson* because it provided only for a rebate, without interest, of any amounts the arbitrator determined were paid in excess of that which was permissible. *Id.* at 305–306. In fact, the procedure provided that no objection could even be made until after the first payroll deduction of the fee. The delay involved in objecting and the review process virtually guaranteed that several months' deductions would be made without any decision on the objection. *Id.* at 296. As a result, although amounts overpaid would eventually be returned to dissenters, the union used the money until ordered to return it. Dissenters' money was, thus, used, at least temporarily, for an improper purpose.

Again, no such problem exists in relation to the Wisconsin procedure. State Bar by-law Article 1, Section 5(b) provides that a member demanding arbitration need not pay any dues until October 31st or 15 days following the arbitrator's decision, whichever is later. This provision obviates the need for an escrow of disputed funds. The Magistrate, therefore, recommends that Plaintiffs' motion for a second preliminary injunction be denied.

As to any challenges Plaintiffs may have in relation to the accuracy of the fee calculation for fiscal year 1993, the Magistrate believes such issues are not yet ripe for decision. The dues reduction procedure in place beginning July 1, 1992, specifically incorporates an opportunity to challenge the fee calculation before an impartial decisionmaker. Such a provision, as previously stated, is required by *Hudson*. The Seventh Circuit Court of Appeals has also already ruled that dissenters must

avail themselves of that procedure before bringing their complaints to court. *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, ___ U.S. _ , 111 S. Ct. 2852 (1991). This court refuses to take part in the business of micro-managing bar associations.

CONCLUSION

The time has come to put this matter to a close. The record in this case shows that numerous steps were taken by both the Wisconsin Supreme Court and Defendants since the inception of the integrated bar in Wisconsin to ensure compliance with existing State and Federal law. Accordingly, the Magistrate recommends that Defendants' motion for summary judgment based upon qualified immunity be granted.

Additionally, the Magistrate recommends that Plaintiffs' second motion for a preliminary injunction be denied. The procedures in place in relation to Wisconsin's mandatory bar requirements and dues reduction for legislative activities clearly comport with the United States Supreme Court's requirements set forth in *Hudson*. All other motions pending in this case are rendered moot. This cause of action, in the Magistrate's opinion should, therefore, be dismissed.

Parties are given ten days from the date of receipt of this opinion to appeal the Magistrate's recommendation to Judge Stanley J. Roszkowski. The Magistrate recommends that Judge Roszkowski limit the parties to 15 pages of argument each. No further briefs should be permitted unless the court so directs, including letters to the court. The record in this case is ample enough to decide the issues set forth by the parties to this cause of action.

E N T E R:

P. Michael Mahoney /s/
P. MICHAEL MAHONEY,
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

DATE: 8/24/92

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

JOHN CROSETTO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 88 C 433 C
	)	
CHIEF JUSTICE NATHAN S. HEFFERNAN, et al.	)	
	)	
	)	
Defendants.	)	

ORDER

Before the court is Defendant Wisconsin Supreme Court Justices' motion to dismiss. For the reasons set forth herein, the court grants Defendants' motion to dismiss.

BACKGROUND

Plaintiffs brought this action against the State Bar of Wisconsin and its executive director and the seven Justices of the Wisconsin Supreme Court. In their third amended complaint, Plaintiffs claim that their First Amendment rights of freedom of speech and association have been violated by the State of Wisconsin's requirement that all practicing attorneys in Wisconsin belong to the State Bar of Wisconsin. Plaintiffs also claim that their First Amendment rights have been violated by the use of Wisconsin State Bar membership dues to finance "legislative and other activities". Plaintiffs seek declaratory relief, compensatory relief and punitive damages pursuant to 42 U.S.C. § 1983. Plaintiffs further seek modifications of

Wisconsin's mechanism for the refund of those portions of Wisconsin State Bar dues that support legislative activities.

Defendant Wisconsin Supreme Court Justices (hereinafter "Defendants"[1]) have brought a motion to dismiss that portion of Plaintiffs' third amended complaint in which Plaintiffs allege a cause of action against these Defendants. Defendants argue two main points in support of their motion to dismiss. First, Defendants state that they are absolutely immune from suit for having promulgated the challenged rules in this case. Second, Defendants assert that, even though they are not absolutely immune from suits for declaratory and injunctive relief when acting in their adjudicative and/or enforcement capacities, the present action against them must still be dismissed. Defendants contend this is so because there is no case or controversy between Plaintiffs and the Wisconsin Supreme Court Justices and because the third amended complaint fails to state a claim upon which relief can be granted.

DISCUSSION

In analyzing a motion to dismiss, this court will not dismiss a complaint unless it is clear there are no set of facts that Plaintiffs could prove consistent with the pleadings that would entitle them to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Murphy v. Lane*, 833 F.2d 106, 107 (7th Cir. 1987); *Vaden v. Village of Maywood*, 809 F.2d 361, 363 (7th Cir.), *cert. denied*, 482 U.S. 908 (1987). The court will accept all well-pleaded factual allegations in the complaint as true. *Vaden*, 809 F.2d at 363; *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F. 2d 411, 414 (7th Cir. 1986). In addition, this court will view the allegations in a

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[1]The court recognizes that there are two groups of Defendants in this case, the seven Wisconsin Supreme Court Justices and the Wisconsin State Bar Association. However, for the sake of brevity, the court will use the term "Defendants" in this opinion to refer only to Defendant Wisconsin Supreme Court Justices.

light most favorable to the non-moving party. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1104, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Wolfolk v. Rivera*, 729 F.2d 1114, 1116 (7th Cir. 1984).

The court agrees with Defendants' first contention that they are absolutely immune from suit in their legislative capacities. Plaintiffs, likewise, agree with this assertion. The promulgation of court rules is analogous to a legislator's action in enacting statutes. Accordingly, Defendants are immune from suit when acting in their legislative capacity. *See, Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). In other words, Defendants are absolutely immune from suit for having promulgated the mandatory bar membership rules and the dues reduction rules. The court must, therefore, turn its attention to the capacities in which Plaintiffs have brought suit against Defendants, that is, their adjudicatory and enforcement capacities.

In *Consumers Union*, 446 U.S. at 736, the United States Supreme Court held that State Supreme Court Justices are not absolutely immune from suit, other than damage suits, when sued as the enforcers of court rules. Furthermore, in *Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984), the United States Supreme Court held that judges are not immune from prospective injunctive relief against them in their judicial or adjudicative capacities. Nevertheless, this court finds that while Defendants have the authority to adjudicate violations of the mandatory bar membership rules and have the inherent power to discipline attorneys for violating these rules, neither authority serves as a basis for continuing this action against Defendants.

In *O'Shea v. Littleton*, 414 U.S. 488 (1974), the United States Supreme Court reiterated the basic rule that when there is no case or controversy between a plaintiff and a judge, article III of the United States Constitution is a bar to suits against judges even for declaratory and injunctive relief. Specifically, the Court stated in *Littleton*:

> [T]hose who seek to invoke the power of federal courts must allege an actual case or controversy ... Plaintiffs in

> the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction' ... It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged ... official conduct ... The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'.... Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse affects.

Id. at 493–96.

Furthermore, in a case very similar to the present cause of action, the Justices of the Puerto Rico Supreme Court were sued over the integrated bar in that commonwealth. In *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17 (1982), the First Circuit Court of Appeals held that there existed no case or controversy between the plaintiff and the Justices to the extent that the Justices simply adjudicated disciplinary proceedings involving the integrated bar requirement. The United States Supreme Court cited *In re Justices* with approval in *Pulliam v. Allen*, 466 U.S. 522, 538 n.18.[2] As such, the fact that Defendants adjudicate disputes regarding their disciplinary rules does not establish a case or controversy under article III of the Constitution. To state a case or controversy, Plaintiff must allege some threatened or actual injury resulting from the allegedly illegal action and Plaintiffs must allege that they have sustained or are immediately in danger of sustaining some direct injury. *O'Shea v. Littleton*, 414 U.S. 488, 493–96 (1974). Plaintiffs have not alleged that there are any pending or

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[2]In *Pulliam v. Allen*, the United States Supreme Court stated:

> Article III also imposes limitations on the availability of injunctive relief against a judge. See *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 21 (CA1 1982) (no case or controversy between a judge who adjudicated claims under statute and a litigant who attacks the constitutionality of the statute).

threatened disciplinary actions against any Wisconsin attorney for failing to join the Wisconsin State Bar.

In addition, because Plaintiffs seek only declaratory relief against Defendants, it is not necessary for Defendants to be included in this action. Ordinarily it is "presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982). In light of Defendants' past conduct,[3] the court finds that Defendants have already demonstrated that they will comply with any declaration that may be made in this case.

Finally, the court notes that as a matter of comity, it is unwise to encourage or force judges to participate as defendants in a federal suit attacking State law. Such action requires judges to abandon their neutrality and tends to undermine their role as judges. This type of harm is tolerated only if it is necessary to afford relief to another party. *In re Justices*, 695 F.2d at 25. The court finds no such necessity in this case. Plaintiffs seek only declaratory relief against these Defendants and Plaintiffs can obtain declaratory relief against the remaining parties. Then, as stated above, it is presumed that Defendants would honor that declaration even though they are not parties to the action.

CONCLUSION

For the reasons set forth herein, Defendant Supreme Court Justices' motion to dismiss is granted. The cause is hereby

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[3]In February of 1988, District Court Judge Barbara Crabb found, in a related case, that the mandatory bar rule was unconstitutional. On May 26, 1988, the Wisconsin Supreme Court ordered that Wisconsin Supreme Court Rule 10.01(1) and 10.03(4), which require membership in the Wisconsin State Bar as a condition precedent to the right to practice law in Wisconsin and which prohibit the practice of law by anyone other than an enrolled active member of the State Bar, would not be enforced. The Court of Appeals subsequently reversed the district court's judgment. Nevertheless, the Wisconsin State Bar remains voluntary.

dismissed against Defendant Supreme Court Justices.

E N T E R:

Stanley J. Roszkowski /s/
STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

DATE: November 16, 1990

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN CROSETTO, ANN FLEISCHLI, on behalf of themselves and, but for the defendants named below, all other similarly situated members of the State Bar of Wisconsin who are not free to choose for themselves whether to join and financially support the State Bar of Wisconsin,

Plaintiffs,

ORDER
88-C-433-C

v.

CHIEF JUSTICE NATHAN S. HEFFERNAN, JUSTICE SHIRLEY S. ABRAHAMSON, JUSTICE WILLIAM A. BABLITCH, JUSTICE WILLIAM G. CALLOW, JUSTICE LOUIS J. CECI, JUSTICE ROLAND B. DAY, JUSTICE DONALD W. STEINMETZ, in their official capacities as Justices of the Supreme Court of the State of Wisconsin an [sic] STEPHEN SMAY, Executive Director of the State Bar of Wisconsin, and THE STATE BAR OF WISCONSIN, an association of lawyers,

Defendants.

This is an action for declaratory, injunctive and monetary relief and punitive damages pursuant to 28 U.S.C. § 1983. Plaintiffs brought this action following this court's decision in *Levine v. Heffernan*, 679 F. Supp. 1478 (W.D. Wis. 1988) enjoining enforcement of Wisconsin supreme court rules

requiring membership in the State Bar of Wisconsin as a condition of the right to practice law in the state on the ground that the membership requirement violates the First Amendment. Plaintiffs' contentions appear to be virtually identical to those raised in *Levine*. Although plaintiffs' amended complaint and briefs are somewhat prolix and disjointed, it appears that plaintiffs wish to raise three claims: that their First Amendment rights have been violated by Wisconsin's requirement that they belong to the State Bar if they wish to practice law in the state, by the State Bar's refusal prior to 1986 to refund to members that portion of their membership dues that were used for the State Bar's legislative activities, and by the State Bar's refusal since 1986 to refund to members that portion of their membership dues that are used for "technical" legislative expenses. Now before the court is plaintiffs' motion to certify a class to pursue claims for money damages pursuant to Rule 23(b)(3) F.R. Civ. P.

BACKGROUND

In order to analyze the merits of plaintiffs' motion for class certification, it is necessary to review the undisputed pertinent facts concerning the recent history of the State Bar.

The State Bar of Wisconsin is an association of lawyers licensed to practice in Wisconsin. Between 1956 and 1988, membership in the State Bar was mandatory. In fiscal year 1987-88, annual membership dues were $115 for a lawyer in active practice more than three years. Dues were raised to $130 for fiscal year 1988-89.

The State Bar conducts numerous activities and programs including legislative activities. These legislative activities include presenting the views of the State Bar on various matters before the legislature, governor, and supreme court of the State of Wisconsin and before Congress and the United States Supreme Court.

The Supreme Court for the State of Wisconsin exercises ultimate, direct, and exclusive control over the integrated State

Bar. On three occasions during the past thirteen years, the supreme court has appointed a committee to review the question of the continued integration of the State Bar, as well as to review its activities and funding. On the first two occasions, the supreme court declined to make membership in the bar voluntary. *See In re Regulation of the Bar of Wisconsin*, 81 Wis.2d xxxv (1977); *Matter of Discontinuation of Wisconsin State Bar*, 93 Wis.2d 385, 286 N.W.2d 601 (1980). Prior to both decisions, the committees and the supreme court had heard testimony contesting the constitutionality of the Bar's dues structure.

The third proceeding, which resulted in the publication of *Report of Committee to Review the State Bar*, 112 Wis.2d xix, 334 N.W.2d 544 (1983), was occasioned by the Wisconsin supreme court's appointment of a committee (known as the Kelly Committee) to review the performance of the Bar. After a hearing was held on the committee's report, the supreme court decided to maintain the mandatory bar, but decided that the use of bar dues for the purpose of legislative advocacy was inappropriate. The supreme court held public hearings on a proposed rebate procedure.

Under supreme court rule 10.03(5) adopted January 21, 1986 and effective July 1, 1986, the dues of members who object to the State Bar's activities that are intended to influence legislation must be reduced on a pro rata basis in the amount of all State Bar expenses for legislative advocacy. In the 1986-87 fiscal year approximately 4,000 lawyers, or thirty percent of the State Bar members, chose to reduce their dues.

OPINION

Consideration of plaintiffs' motion to certify a class to pursue monetary claims under Federal Rule of Civil Procedure 23(b)(3) begins with Rule 23(a), which sets forth the prerequisites to any class action under Rule 23(b). Rule 23(a) provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) further requires that in any action brought under that subsection the court must find that common questions of law or fact predominate and that a class action is the best available method for resolving the parties' dispute. A plaintiff has the burden of proving that a case is appropriately a class action, and failure to meet any one of the requirements of Rule 23 precludes certification of a class. *Patterson v. General Motors Corporation*, 631 F.2d 476, 480 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981); *Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir. 1976). In addition to these prerequisites, the named plaintiff must show the existence of a class and that he is a member of the class. *Simer v. Rios*, 661 F.2d 665, 669 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); *Adashunas v. Nagley*, 626 F.2d 600, 603 (7th Cir. 1980).

Plaintiffs have proposed four possible formulations of the class they wish the court to certify. Because plaintiffs have failed to specify clearly which issues would be litigated by the proposed classes, have failed to articulate the relationships between the claims they wish to raise in this litigation and the proposed classes, and have failed to establish the existence of a proper class, plaintiffs' motion for class certification will be denied without prejudice to their bringing a new motion for class certification after they have reformulated the membership of the proposed class and clarified which claims will be pursued by the proposed class.

Plaintiffs have proposed four possible classes:

(1) all lawyers licensed to practice in Wisconsin who are not free to choose whether to support the State Bar's legislative

activities financially, excluding plaintiffs' attorney and the defendants, and excluding as well all those who have been employees of the State Bar or members of the State Bar's Board of Governors since 1977;

(2) all lawyers licensed to practice in Wisconsin who between July 1, 1983 and July 1, 1986 were not free to choose whether to support the State Bar's legislative activities financially, excluding plaintiffs' attorney and the defendants, as well as all those who have been employees of the State Bar or members of the State Bar's Board of Governors;

(3) the approximately 4,000 lawyers licensed to practice in Wisconsin who in 1986 and 1987 requested a rebate of those dues spent on the State Bar's legislative activities, excluding plaintiffs' attorney and the defendants, as well as all those who have been employees of the State Bar or members of the State Bar's Board of Governors;

(4) all lawyers licensed to practice in Wisconsin who formally objected at any time to the expenditure of their dues on the State Bar's legislative activities, excluding plaintiffs' attorney and the defendants, as well as all those who have been employees of the State Bar or members of the State Bar's Board of Governors.

To determine whether any of these proposed classes is an appropriate class, it is necessary to determine what claims the class intends to raise. Plaintiffs have stated that they wish class certification only as to money damages and do not wish a class to be certified as to all their claims. *See* Fed. R. Civ. P. 23(c)(4) (when appropriate "an action may be brought or maintained as a class action with respect to particular issues.") Unfortunately, plaintiffs have not made clear which issues would be litigated by the proposed class.

In their amended complaint, plaintiffs' primary contention appeared to be that their First Amendment rights were violated by the requirement that all practicing lawyers belong to the State Bar. However, in the wake of this court's decision in *Levine* that a mandatory bar is unconstitutional, 679 F. Supp. at 1478, the State Bar made membership voluntary. Despite the

reversal of this court's decision by the Court of Appeals for the Seventh Circuit, 864 F.2d 457 (7th Cir. 1988), membership in the State Bar has remained voluntary and the State Bar has represented that it will maintain voluntary membership pending final resolution of *Levine*. As a result, in their brief in support of their motion for class certification, plaintiffs state that they are "not now seeking certification for the forced membership requirement" and request that resolution of that issue be "held in abeyance until *Levine* runs its course." Plaintiffs' Brief at 9. Despite this recognition that mandatory bar membership is not presently an issue in this case, in their briefs plaintiffs continuously interject the issue and conflate their objections to the past and current dues structure with their objections to a mandatory bar. *See, e.g.*, Plaintiffs' Brief at 9 (proposing class of lawyers who are not "free to choose for themselves whether to financially support" the State Bar's legislative activities); Plaintiffs' Brief at 11 (common wrong proposed class has suffered is being required "to financially support all or part of the State Bar's legislative and political activities under threat that they will lose their law licenses if they do not").

Plaintiffs' second claim appears to be that prior to the imposition of a rebate plan in 1986, their First Amendment rights were violated because a portion of the dues that they were required to pay was used to support the State Bar's legislative activities. In their brief in support of their motion for class certification, plaintiffs clearly request class certification on this issue.

The third issue raised in plaintiffs' amended complaint is that the rebate instituted in 1986 is inadequate because it does not apply retroactively and because it does not include costs for review and analysis that is not directly intended to influence legislation, for technical expenses such as monitoring legislation, for responding to inquiries by legislators concerning issues on which the Bar has not taken an official position, and for other activities that plaintiffs consider to be legislative in nature. I cannot determine from plaintiffs' motion for class certification or their briefs on the motion whether plaintiffs envision that the

proposed class would litigate this issue. The briefs in support of their motion for class certification contain no direct references to the issue. The only reference to it in the briefs is rather cryptic:

> Irrespective of what class if [sic] found, and irrespective of whether any money damages are awarded, just as important is the question of whether the State Bar's dues reduction plan is unconstitutional because it does not cover all of the State Bar's legislative (and political) expenses. Since the Defendants no doubt are going to move for summary judgment, this issue apparently then will be determined. Plaintiffs therefore will brief said issue at that time and/or ask for a separate declaratory judgment so that even if the money damage claim is dismissed, the present dues reduction plan can be replaced by one which is not constitutionally defective.

I cannot determine from this statement whether plaintiffs intend to litigate as a class action the money damage claim concerning the amount of the dues rebate or whether they wish that all aspects of that issue should be decided separately. Although logic might dictate that the issue of the size of the rebate should be litigated by the same parties and in the same manner as the issue of the necessity of the rebate, I cannot assume that this is plaintiffs' intention.

The issues the proposed class intends to raise determine the appropriate membership of the class. For example, a class that contested the State Bar's failure to implement a rebate system prior to 1986 might consist of members of the State Bar who had formally requested a rebate prior to 1986 and been denied. However, a class contesting the size of the rebates given in 1987 and 1988 might consist of those who had received rebates in those years and had formally protested the amount of the rebate. A class that intended to contest both would be composed of yet a third set of members. Without knowing the exact claims the proposed class intends to litigate, I cannot

determine whether a class exists or what might be the proper membership of such a class.

Even if plaintiffs had specified the claims the proposed class would raise, there exist other problems with the proposed classes which would prevent a finding that any one of them is a properly defined plaintiff class. Plaintiffs' first proposed class consists of all lawyers who are licensed to practice in Wisconsin who are not free to choose whether to support the State Bar's legislative activities financially, excluding defendants and employees and officers of the State Bar. This proposed class includes no one. Membership in the State Bar is voluntary at present. Any lawyer may choose not to join the State Bar; a lawyer who chooses not to belong to the Bar does not pay dues. Thus, there are no no [sic] lawyers who are not free to choose whether they wish to support the Bar's activities.

Plaintiffs' second proposed class consists of all lawyers who were not free to choose whether to support the State Bar's legislative activities, between the time the supreme court decided in 1983 that a rebate system should be instituted and July 1986 when the system was implemented, excluding defendants and employees and officers of the State Bar. This proposed class has no relationship to the events occuring [sic] after the implementation of the rebate plan and thus presumably would not be able to contest the size of the rebate.

A second flaw with this formulation of the proposed class is that it includes all bar members and not only those who refused to pay or formally requested a refund of dues that were used for legislative activities. It cannot be presumed that all members of the proposed class would have choosen [sic] not to support the State Bar's legislative activities between 1983 and July 1986. In cases concerning refunds for union dues spent on political activities, the United States Supreme Court has held that unions cannot spend union dues on political activities over the duespayers' objections. *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1976). However, "dissent is not to be presumed." *Id.* at 238, quoting *International Association of Machinists v. Street*, 367 U.S. 740, 774 (1960). Employees must

inform the unions of their objections to the payment of dues used for political purposes. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 293, 306, 306 n.16 (1985); *Abood*, 431 U.S. at 237-241; *Street*, 367 U.S. at 774. Plaintiffs' claim that they are constitutionally entitled to a refund of bar dues is premised entirely on these cases. I see no reason why the requirement that dues payers make known their objections to the expenditure of their dues for political purposes should not be applied in the bar context as well. There is no greater reason to presume that a lawyer objected to certain uses of his Bar dues than to presume that an employee objected to certain uses of his union dues. The interests protected are virtually identical, and the requirements for voicing dissent should be identical as well.

Plaintiffs' third proposed class addresses the problem of the need for objections, but raises other concerns. The third proposed class consists of the approximately 4,000 lawyers who in 1986 and 1987 requested a rebate of that portion of their dues that was spent on legislative activities, excluding defendants and employees and officers of the State Bar. There are major flaws with this definition of the plaintiff class. First, like the previous proposed class, some individuals are both plaintiffs and defendants. Second, it is not clear what such a class would be requesting. It could not be claiming that lawyers were entitled to rebates in 1986 and 1987 since they received rebates in those years. It might be claiming that the class members should have received larger rebates in those years. However, as I noted above, plaintiffs do not seem to envision that the proposed class would litigate the issue of the size of the rebates. Second, there is no indication that members of this proposed class objected formally to the amount of the rebate they received. Finally, the class could be claiming that they were entitled to rebates prior to 1986. However, not all those who claimed rebates in 1986 and 1987 were members of the State Bar in earlier years. In addition, there is no indication that those who requested rebates in 1986 and 1987 made formal requests for rebates in previous years. Finally, even if formal

requests were not required, it is not clear that all those who requested a rebate when one was offered to them would argue that they were entitled to one prior to the implementation of the rebate system. A lawyer's request for a rebate in 1986 and 1987 may have no connection to the lawyer's opposition to or support for the Bar's use of membership dues for its legislative activities or the lawyer's belief that he or she was entitled to earlier rebates.

The Court of Appeals for the Seventh Circuit discussed this final point recently in regard to refunds of union dues. *See Gilpin v. American Federation of State, County, and Municipal Employees, AFL-CIO*, slip op. 88-2441 (7th Cir. May 24, 1989). When a union represents non-union workers through an agency shop agreement and charges them a pro rata share of the costs it incurs in representing them, the union may not impose charges that are used to finance activities not germane to its duties as a collective bargaining agent, such as the union's political activities. *Abood v. Detroit Board of Education*, 431 U.S. 209. In *Gilpin*, several nonunion employees sued the union that represented them in collective bargaining, claiming that a portion of the "share fair fees" the union charged them were used to finance activities that were not germane to the union's duties. *Gilpin*, slip op. 88-2441 at 2-3. When the employees moved to certify a class of the 10,000 employees in the bargaining unit who were not union members and thus were charged only fair share fees and not the full dues amount, their motion was denied.

The court of appeals held that in these circumstances the members of the proposed class could have conflicting interests and thus class certification would be improper.

> Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two

> types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with - and only with - the aims of the first type of employee.

Id. at 4. *See also Independent Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1274 (7th Cir. 1985) (upholding denial of class certification where plaintiffs had conflicting economic interests).

In this case, plaintiffs seek compensatory and punitive damages. Those who oppose the mandatory bar may wish to obtain compensatory damages for the State Bar's failure to provide refunds prior to 1986, as well as punitive damages. Those who do not oppose the aims of the State Bar but merely wish to pay the lowest dues possible may not wish for compensatory damages for those years before the rebate was offered and certainly would not wish for the imposition of punitive damages. The imposition of such damages could injure the financial standing of the Bar, something this latter group would not necessarily desire, and might well result in higher dues for all members, a result that this group would certainly wish to avoid.

Plaintiffs' final proposed class consists of all lawyers who objected formally to the expenditure of their dues for legislative activities. Plaintiffs suggest that the class should include all lawyers who made known their opposition to the dues structure by appearing at hearings conducted before the supreme court or the Kelly Committee, by filing briefs with the supreme court, by signing petitions submitted to the State Bar or the Kelly Committee, by corresponding with any of these entities, or by membership in a section of the Bar that undertook any of these activities. Plaintiffs estimate that approximately 1,000 individuals would fall within this class.

Only those who have refused to pay or have formally

objected to the payment of dues may belong to a class contesting the constitutionality of the dues payment. The United States Supreme Court has imposed this requirement because the defendant "should not in fairness be subjected to sanctions in favor of a [member] who makes no complaint." *Street*, 367 U.S. 774. In those cases in which the Supreme Court has found unconstitutional the payment of union dues used for political purposes, the union employees had either refused to pay their dues, *see, e.g., Abood*, 431 U.S. at 212 n.2; *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 116 (1962), or had paid under protest. *See, e.g., Abood*, 431 U.S. at 212 n.2.[1]

In this case, it would be appropriate to certify a class consisting of all lawyers who had refused to pay that portion of their dues used for legislative activities or who had paid their dues only after informing the State Bar that they opposed the use of their dues for legislative activities and desired a rebate. It would not be appropriate to certify a class consisting of all those who had generally opposed the Bar's dues structure in letters, briefs, petitions, and hearing testimony. Where members withhold their dues or formally request a rebate, the State Bar is forewarned not only that its dues policy is challenged, but also that specific individuals are demanding a rebate. The Bar is then on notice that it must provide the rebate or risk judicial sanctions. Furthermore, the Bar is notified that specific dues payments it has received are contested and may choose to place them in escrow or otherwise protect its financial position.

Where members make general challenges to the State Bar's dues structure, the Bar is not so forewarned. Many lawyers disagreed with the Bar's dues policy. In attempts to alter that policy, they petitioned and wrote letters to the Bar, brought actions before the Wisconsin supreme court, and testified and presented written views to the Kelly Committee. However, it

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[1]Although in Abood the Court noted that some plaintiffs had paid their dues with no apparent protest, its later discussion makes clear that only those who had protested were entitled to a remedy. See 431 U.S. at 237-241.

does not follow necessarily, that those who attempt to change a policy intended to refuse to abide by the policy while their crusade is ongoing or after their attempt fails. A general disagreement with a policy that is carried on through judicial or legislative channels does not always translate into individual resistance or disobedience. Such was the case here. Thus, the judicial and legislative challenges to the dues structure did not constitute a formal objection to dues by the individual lawyers.

ORDER

IT IS ORDERED that plaintiffs motion for class certification pursuant to Rule 23 is DENIED without prejudice.

Entered this 12th day of June, 1989.

BY THE COURT:

Barbara B. Crabb /s/
BARBARA B. CRABB
District Judge

APPENDIX F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 24, 1994

HON. JOEL M. FLAUM, Circuit Judge

HON. FRANK H. EASTERBROOK, Circuit Judge

HON. MICHAEL S. KANNE, Circuit Judge

JOHN CROSETTO, KENNETH J. DORAN and DOUGLAS W. KAMMER, Plaintiffs-Appellants,	] Appeal from the] United States] District Court for] the Western District] of Wisconsin.
No. 92-3899 v.	]
	] No. 88 C 433
STATE BAR OF WISCONSIN, STEPHEN L. SMAY, NATHAN S. HEFFERNAN, et al., Defendants-Appellees.	]] Stanley J.] Roszkowski,] Senior Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause on January 3, 1994, by plaintiffs-appellants, no judge in active

service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, **DENIED.**

*Honorable Richard D. Cudahy and Honorable John L. Coffey, Circuit Judges, did not participate in the consideration of this petition for rehearing with suggestion for rehearing en banc.

APPENDIX G

United States Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VII

In Suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV provides in pertinent part:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

. . .

Statutes

42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ***, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rules

SCR 10:03(5)(b) as amended July 1, 1993, now provides:

The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The State Bar may not use compulsory dues of any member who objects to that use for political or ideological activities that are reasonably intended for the purposes of regulating the legal profession or improving the quality of legal services. The State Bar shall fund those political or ideological activities by the use of voluntary dues, user fees or other sources of revenue.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN CROSETTO, KENNETH J. DORAN and DOUGLAS W. KAMMER, Plaintiffs-Appellants,	] Appeal from the United States District Court for the Western District of Wisconsin
No. 92-3899 v.	]
STATE BAR OF WISCONSIN, STEPHEN L. SMAY, NATHAN S. HEFFERNAN, SHIRLEY S. ABRAHAMSON, WILLIAM A. BABLITCH, WILLIAM G. CALLOW, LOUIS J. CECI, ROLAND B. DAY and DONALD W. STEINMETZ, Justices of the Wisconsin Supreme Court, Defendants-Appellees.	] No. 88 C 433 Stanley J. Roszkowski, Judge.

****

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN
HONORABLE STANLEY J. ROSZKOWSKI
JUDGE

(CASE NO. 88 C 433)

****

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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AND DOUGLAS W. KAMMER

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Supreme Court, U.S.
FILED
MAY 25 1994
OFFICE OF THE CLERK

No. 93-1706

In The

Supreme Court of the United States

October Term, 1993

JOHN CROSETTO, KENNETH J. DORAN, and DOUGLAS W. KAMMER,

Petitioners,

v.

STATE BAR OF WISCONSIN, STEPHEN L. SMAY, and NATHAN S. HEFFERNAN, SHIRLEY S. ABRAHAMSON, WILLIAM A. BABLITCH, WILLIAM G. CALLOW, LOUIS J. CECI, ROLAND B. DAY and DONALD W. STEINMETZ, Justices of the Wisconsin Supreme Court,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS STATE BAR OF WISCONSIN AND STEPHEN L. SMAY

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36 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED[1]

1. Did the Court of Appeals properly remand this matter for a determination of whether the subject matter jurisdiction of the federal courts extends to claims against the State Bar of Wisconsin?

2. Did the Court of Appeals properly determine that the Executive Director of the State Bar of Wisconsin is entitled to qualified immunity as a matter of law?

3. Did the Court of Appeals properly affirm the dismissal of petitioners' motion for declaratory relief challenging the dues reduction procedure for 1992-93?

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[1] Petitioners' list of questions presented includes questions addressed to the Court of Appeals' decision affirming dismissal of the claims against the Justices of the Wisconsin Supreme Court. The propriety of granting certiorari concerning those claims is not addressed in this response, although respondents join the defendant justices in opposing the petition.

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties to the proceeding in the Court of Appeals appear in the caption of this case. None of the parties is a corporation.

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BRIEF IN OPPOSITION OF RESPONDENTS STATE BAR OF WISCONSIN AND STEPHEN L. SMAY

The respondents State Bar of Wisconsin ("State Bar") and Stephen L. Smay ("Smay"), by their undersigned counsel, respectfully request that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 12 F.3d 1396. The District Court's order adopting the Report and Recommendation of the Magistrate Judge and dismissing this action is reported at 810 F. Supp. 966. The District Court's order dismissing petitioners' complaint against the defendant Justices of the Wisconsin Supreme Court is reported at 771 F. Supp. 224.

COUNTERSTATEMENT OF THE CASE

Petitioners' description of the "Nature of the Case" is materially incomplete and factually inaccurate. Contrary to petitioners' unsubstantiated, though oft-repeated, charges against the Justices of the Wisconsin Supreme Court and the State Bar, the undisputed factual record compels the conclusion reached by the courts below: that the Wisconsin Supreme Court and the State Bar have consistently acted from the inception of the integrated bar in Wisconsin to ensure that the State Bar is structured and operated in a manner that complies with the dictates

of state and federal law.[2] Indeed, the Wisconsin Supreme Court voluntarily suspended enforcement of its integrated bar rule for four years pending resolution of *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis.), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989) (challenging Wisconsin's integrated bar rule), and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (challenging use of mandatory bar dues for political and ideological activities), rather than risk any arguable constitutional infringement to members of the bar. As the district court held below, petitioners' relentless attempts to paint a contrary picture through factual misstatements and unreasonable inferences are overwhelmed by this record.

A. Background.

1. Decision of the Wisconsin Supreme Court to integrate the Bar.

In 1943, the Wisconsin legislature enacted a bill directing that there "shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in

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[2] The misstatements and mischaracterizations in the petition are too numerous to address individually. Most are irrelevant to the questions presented for review in any event. Except for the mischaracterizations of the decisions below (which are apparent from even a cursory reading of the decisions), the State Bar and Smay have addressed petitioners' misstatements of fact numerous times below. The most complete response is found in Defendants' Reply to Plaintiffs' Response to Statement of Undisputed Facts (R.292).

the association shall be a condition precedent to the right to practice law in Wisconsin." Ch. 315, 1943 Wis. Laws (codified as Wis. Stat. § 256.31 (1943)). The Wisconsin Supreme Court construed the statute as an advisory legislative declaration that integration of the Bar would promote the general welfare of the state. *See Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943). The court nevertheless deferred the decision to integrate. *Id.* at 54-55, 11 N.W.2d at 625. Three years later, the court again declined to integrate the Bar. *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).

Ten years later, the court noted that "too many lawyers have refrained or refused to join [the voluntary association], that membership in the voluntary association has become static, and that a substantial minority of the lawyers in the state are not associated with the State Bar Association." *In the Matter of the Integration of the Bar*, 273 Wis. 281, 283, 77 N.W.2d 602, 603 (1956). Thus, the court ordered integration of the Bar on an interim basis. *Id.* at 285, 77 N.W.2d at 604. Following a two-year trial period, the court made the integrated State Bar permanent. *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958).

2. Constitutional challenge to the integrated bar: *Lathrop v. Donohue.*

The Wisconsin Supreme Court soon reviewed the constitutionality of the integrated State Bar. *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960). In upholding the Bar's constitutionality, the court explained that "the State Bar is a public and not a private agency."

Id. at 242, 102 N.W.2d at 411. The court noted "[t]he only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process." *Id.* at 238, 102 N.W.2d at 408. The court quoted approvingly the declaration of its distinguished former chief justice, Marvin Rosenberry, in his 1943 decision in *Integration of Bar* "that the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation." *Id.* The court further noted that the integration rule and bylaws of the State Bar "do not compel the plaintiff to associate with anyone. . . . The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues. . . . " *Id.* at 237, 102 N.W.2d at 408.

This Court upheld the mandatory membership requirement in *Lathrop v. Donohue*, 367 U.S. 820 (1961). At the same time, a plurality of the Court (Justice Brennan, joined by Chief Justice Warren and Justices Clark and Stewart) found the record inadequate to decide the narrower issue of whether certain of the Bar's "political" activities violated plaintiff's First Amendment rights. Justices Harlan, Frankfurter and Whittaker concurred in the result, but rejected outright the notion that mandatory bar dues, even if used on legislative matters, could ever constitute a violation of a dissenting Bar member's constitutional rights.

3. More recent challenges and responses by the Wisconsin Supreme Court and State Bar: Accommodating Dissent.

Since *Lathrop*, the structure, purposes and activities of the State Bar have undergone repeated, careful review by the Wisconsin Supreme Court and by special committees appointed by that court. In July of 1976, the Wisconsin Supreme Court appointed a committee chaired by Judge Andrew Parnell ("Parnell Committee") to study and report on the Bar's activities and the question of whether to continue integration. The supreme court delivered its opinion on the report in *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1977).

Commenting on the resolutions of the Parnell Committee, the court expressed approval of the Bar's legislative activities, including "traditional lobbying." *Id.* at xxxix. The court advised the State Bar to bring "major issues of legislative policy" before the membership at annual and midwinter meetings, when possible. Recognizing the presence of "issues raised in *Lathrop*," the court carefully delineated the Bar's authority in legislative activities to include "matters concerning the administration of justice and the practice of law, including matters of substantive law on which the views of lawyers have special relevance. The guiding princip[le] . . . must always be the public interest." *Id.* at xxix-xl.

The court again addressed the issue of the integrated bar in *In Matter of Discontinuation of State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980). Several State Bar members appeared and argued against continued integration. *Id.* After hearing oral argument,

the Wisconsin Supreme Court reaffirmed its approval of the Bar's activities and rejected the petitioners' request to make the State Bar of Wisconsin voluntary. *Id.* The court did, however, express its general hesitance about the State Bar's involvement with the Wisconsin Lawyers Political Action Committee ("LAWPAC"), a separately-formed and independently-funded political action committee, and ordered that a committee be formed to study the propriety of mandatory membership, whether the Bar's involvement with LAWPAC was permissible and possible alternatives to the integrated bar. *Id.* at 387, 286 N.W.2d at 603.

The committee, chaired by Attorney John Kelly ("Kelly Committee"), submitted its report to the supreme court on October 1, 1982. After holding a public hearing on the Kelly Report, the court reaffirmed its commitment to integration of the State Bar, but ordered that the Bar disassociate itself from LAWPAC. *Report Of Committee To Review The State Bar*, 112 Wis. 2d xix, 334 N.W.2d 544 (1983). Pursuant to that order, the State Bar severed all of its remaining ties with LAWPAC. *See* Affidavit of Stephen L. Smay in Support of Motion for Summary Judgment (R.269), ¶¶ 11-17.[3]

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[3] Petitioners continue to insist in their petition that there is some basis to contradict the evidence that the State Bar and Smay severed all ties with LAWPAC in 1983. However, as the district court found after carefully reviewing the record evidence, despite four years of discovery, petitioners "failed to come forward with any . . . real evidence of an actual, continuing relationship between the LAWPAC and the Wisconsin State Bar." 810 F. Supp. at 979 (App. 42a).

At the same time, the court ordered that hearings be held to institute a rebate procedure for those members dissenting from legislative positions taken by the State Bar. While the court recognized that the Bar's involvement in the legislative arena raised the spector of potential infringement, the court did not find that any infringement had in fact occurred, and approved the rebate procedure simply as a preventive measure. *Id.* at xxiii-iv, 334 N.W.2d at 548.

The court did not specify how the rebate procedure was to be implemented.[4] Instead, the court ordered public hearings on the matter. *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5)*, 127 Wis. 2d xi, 374 N.W.2d XLV (1986). On February 28, 1985, the court ordered the Bar to consider four alternative rebate plans. An additional hearing was held on May 23, 1985. *Id.* Ultimately,

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[4] From the outset of this litigation, petitioners have asserted that the Supreme Court of Wisconsin reneged on a "promise" to institute a dues rebate program effective July 1, 1983. As "evidence" of this "promise," petitioners point to a March 28, 1984 Order of the supreme court. Petitioners make the same erroneous assertion on appeal. *See, e.g.*, Pet. 4-5. The March 28, 1984 order simply proposed "a procedure whereby a member of the State Bar of Wisconsin could obtain a refund of that portion of his or her dues spent by the State Bar on legislative matters." (*See* Appendix to Defendants' Brief in Support of Motion for Summary Judgment (R.273), Tab 10) Attached to the order was a "proposed rule establishing such procedure to be effective commencing with the State Bar's 1983-84 fiscal year." The court ordered a hearing to be held on the proposal on September 17, 1984. *Id.* At no point in the order, or subsequently, did the Wisconsin Supreme Court make any promise that any dues rebate procedure ultimately implemented would have an effective date of July 1, 1983.

the court adopted a dues reduction plan that, consistent with *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984), permitted objectors to deduct their pro rata share of dues expended for legislative activities at the outset of each fiscal year. *Id.*

On April 19, 1986, in response to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the State Bar's Board of Governors passed a bylaw providing for an arbitration proceeding in the event of a dispute between the Bar and a member concerning the allocation of expenditures to "legislative activities" as defined under the court's dues reduction plan. This procedure was approved by the Wisconsin Supreme Court in *Petition to Review Bar Bylaw Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987). In its decision, the court found, contrary to the contention of a number of dissident Bar members, that the State Bar bylaw established a mechanism to resolve any dispute with respect to the calculation of the dues reduction, and thus satisfied the constitutional requirements set forth in *Hudson* even assuming those requirements were "applicable to the case before us." *Id.* at 689-94, 407 N.W.2d at 925-27.

4. Suspension of the mandatory bar rule and *Keller v. State Bar of California*.

The State Bar remained integrated, with a dues reduction procedure in place, until 1988, when a federal district court declared the integrated bar in Wisconsin unconstitutional. *Levine v. Supreme Court of Wisconsin*, 679

F. Supp. 1478 (W.D. Wis. 1988). In the wake of that decision, the Wisconsin Supreme Court suspended enforcement of the mandatory membership rule on May 26, 1988. The suspension was maintained even after the Seventh Circuit reversed the lower court. *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), and remained in effect until July 1, 1992. *In Matter of State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).

On June 4, 1990, this Court issued its decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990). Citing *Lathrop*, the Court reaffirmed the constitutionality of the integrated bar, 496 U.S. at 7, and held, for the first time, that the analysis set forth in its union and agency shop cases (*e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)) applied to integrated bars. *Id.* at 10-12. Thus, the Court held an integrated bar may "constitutionally fund activities germane to [the] goals [of regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside those areas of activity." *Id.* at 14. The Court also stated that "an integrated bar could certainly meet its *Abood* obligation [not to fund non-germane ideological activities with mandatory dues] by adopting the sort of procedures described in *Hudson*." *Id.* at 17.

5. Reintegration of the State Bar of Wisconsin.

Effective July 1, 1992, the Wisconsin Supreme Court reestablished the mandatory bar under a set of new Wisconsin Supreme Court rules and State Bar bylaws. *In*

Matter of State Bar of Wisconsin: Membership, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).[5]

B. Course Of Proceedings Below.

Petitioners brought this lawsuit against defendants State Bar of Wisconsin, its executive director Stephen L. Smay, and the Justices of the Wisconsin Supreme Court exactly three months after the district court's decision in *Levine*. Petitioners purported to bring this suit as a class action on behalf of all members of the State Bar who allegedly were required to support the State Bar's past expenditures in violation of the First and Fourteenth Amendments.[6]

Petitioners sought approximately $500,000 in compensatory damages (allegedly representing the amount of mandatory dues spent on unconstitutional activities during fiscal years 1983 through 1987) and some $600,000 in punitive damages for defendants' alleged reckless disregard of petitioners' constitutional rights. (Complaint, R.2) In addition, petitioners sought to enjoin the State Bar from returning to mandatory status. (*Id.*)

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[5] The text of Wisconsin Supreme Court Rule ("SCR") 10.03(5)(b) and State Bar Bylaw Article I, Section 5 are set out in the Supplemental Appendix to this brief.

[6] Petitioners' first motion for class certification was denied without prejudice. (App. 56a-68a) Their second motion for certification was one of the pending motions dismissed by the district court in light of its decision on the merits. *See supra* note 7. Petitioners do not appear to seek review of the denial of their certification motion. *See* Pet. at i.

Following the *Keller* decision, the Justices of the Wisconsin Supreme Court brought a motion to dismiss the claims against them on the grounds that they were absolutely immune from suit for their quasi-legislative conduct and that there was no immediate threat of injury to the petitioners. The district court granted the motion on November 16, 1990. 771 F. Supp. 224.

Petitioners continued to press their claims against defendants State Bar and Smay. As the district court noted, the nature of petitioners' claims has remained "prolix and disjointed" despite repeated amendments to their complaint. 810 F. Supp. at 976 (App. 36a). Petitioners have maintained their challenge to the constitutionality of the State Bar's past expenditures of membership dues on a variety of activities, for which they seek substantial compensatory and punitive damages. While petitioners ultimately dropped their claim directly challenging the constitutionality of Wisconsin's integrated bar rule, they also continued to challenge any reinstatement of that rule.

On April 15, 1991, defendants State Bar and Smay filed a comprehensive motion for summary judgment, arguing that petitioners' claims for prospective relief against the suspended mandatory bar rule were moot. Defendants also argued that petitioners' claims for past damages (1) were barred by the doctrine of qualified immunity, (2) would result in an improper, retroactive application of *Keller* and (3) were further barred by petitioners' failure to object contemporaneously to the Bar's expenditures.

Over a year later, petitioners filed a second motion for preliminary injunction seeking to enjoin the reintegration of the mandatory bar in Wisconsin on the grounds that the newly-adopted procedures of the Wisconsin Supreme Court for preventing the use of mandatory dues for improper purposes under *Keller* were constitutionally inadequate.

On August 24, 1992, the magistrate judge issued a 36-page Report and Recommendation, recommending: (1) that the motion for summary judgment on petitioners' claims for damages resulting from past conduct should be granted on the grounds that the State Bar and Smay acted in good faith and are entitled to qualified immunity; (2) that petitioners' second motion for a preliminary injunction should be dismissed on the grounds that the new rules and bylaws under which the State Bar was to be reintegrated were facially valid, and that petitioners' claims that the fee calculation for fiscal 1993 made under those rules – which had not yet been reviewed by an impartial arbitrator – were not ripe; and (3) all other pending motions should be dismissed on the grounds that dismissal of the summary judgment and preliminary injunction motions rendered those motions moot.[7]

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[7] In addition to the motions discussed above, the following motions were encompassed by the magistrate judge's recommendation: plaintiffs' motion to vacate order denying class certification; plaintiffs' motion to strike insufficient defenses; plaintiffs' motion for preliminary injunction and declaratory ruling (concerning the rules effective 1986-88); plaintiffs' motions to reopen discovery; plaintiffs' motion for production of documents; plaintiffs' motion to amend final pretrial report; cross-motions for sanctions; and plaintiffs' second motion for

After considering petitioners' objections to the magistrate judge's report and defendants' response, the district court adopted the report and recommendation of the magistrate judge and ordered that this action be dismissed. Judgment was entered in favor of defendants on October 28, 1992.

The Court of Appeals affirmed the decision of the district court, except dismissal of the State Bar. Although it questioned whether the State Bar as an entity rather than a natural person was entitled to assert a qualified immunity defense, the Court of Appeals did not reach that issue. Instead it raised *sua sponte* the question of whether the subject matter jurisdiction of the federal courts extended to claims against the State Bar of Wisconsin. Noting the weight of authority holding state bars entitled to sovereign immunity, the Court of Appeals remanded to the district court for a determination of the State Bar's sovereign status. 12 F.3d at 1402 (App. 11a).

REASONS FOR DENYING THE WRIT

Although not altogether clear, petitioners appear to raise two principal arguments for why this Court should grant certiorari to review the Court of Appeals' decision concerning the State Bar and Smay. First, they argue that the decision below conflicts with established law because (a) the jurisdictional question of the Bar's immunity from

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preliminary injunction. Plaintiffs' second motion for declaratory judgment was filed after the magistrate judge's report was issued and before the district court dismissed the action. (R.378)

suit should not have been remanded for factual findings; (b) qualified immunity is not a question of law; and (c) the Court of Appeals' decision affirming the validity of SCR 10.03(5)(b) and State Bar Bylaw Article I, Section 5 (1992) is in conflict with *Keller* and two lower court decisions. Second, they claim that this case raises questions left open in *Keller* which must be resolved. Petitioners are wrong on both counts.

I. IT IS PETITIONERS' ARGUMENTS, NOT THE DECISION BELOW, WHICH CONFLICT WITH ESTABLISHED LAW.

A. The Court Of Appeals Properly Remanded For A Determination Of Jurisdiction Over The State Bar.

Petitioners' first claim of error is fundamentally at odds with the law concerning subject matter jurisdiction. It has been established without question for over a century that "on every writ of error or appeal the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it." *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). *See also Pennhurst v. Halderman*, 465 U.S. 89, 99 n.8 (1984).

The Court of Appeals in this case properly raised that fundamental question concerning its jurisdiction over the State Bar, and determined that there were insufficient facts in the record to answer it. Accordingly, it remanded the case to the district court to make the necessary factual findings and answer the question in the first instance.

Petitioners' suggestion that this Court should expend its limited resources to review an issue which has yet to be decided by the courts below must be rejected.

B. Qualified Immunity Is A Question Of Law.

Petitioners' second argument seems to be that the question of Smay's immunity was improperly decided as a question of law. Petitioners' argument on this issue displays their misunderstanding of the nature of the defense of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court "refashioned the qualified immunity doctrine in such a way as to 'permit the resolution of many insubstantial claims on summary judgment.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817).

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. . . . *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution *of the essentially legal question* whether the conduct of which the plaintiff complains violated clearly established law.

Id. (emphasis added).

As the courts below found, "before the *Keller* decision 'even the basic issue of the applicability of First Amendment protections to lawyers in an integrated bar was open to question.' . . . Notably, the California Supreme

Court was reversed by the Supreme Court of the United States on this point of law as late as 1990." 12 F.3d at 1404 (App. 15a-16a) (quoting magistrate judge's report, 810 F. Supp. at 977 (App. 39a)). "Prior to *Keller*, *Lathrop* was 'the last Supreme Court decision squarely to address the [F]irst [A]mendment rights of lawyers in an integrated bar.'" 810 F. Supp. at 977 (App. 39a-40a) (quoting *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986)). *See also Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 865 (1992) (the Court "establish[ed] for the first time [in *Keller*] that the principles it previously had developed for the permissible use of compulsory union dues are equally applicable for the use of mandatory bar dues.").

Thus, since the constitutional rights petitioners contend were violated were not clearly established before 1990, the Court of Appeals properly determined that Smay was entitled to qualified immunity for his conduct prior to that time. 12 F.3d at 1404 (App. 16a).[8]

C. The Dismissal Of Petitioners' Claims For Injunctive And Declaratory Relief Challenging The Bar's Dues Reduction Plan For 1992-93 Is Consistent With *Keller* And *Schneider*.

Although the petition lodges numerous complaints about the decisions below, petitioners' primary complaint appears to relate to their second motion for declaratory

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[8] In any event, the district court properly found that petitioners' claims were unsubstantiated. *See* 810 F. Supp. at 978-79 (App. 41a-42a).

judgment, which challenged the validity of the 1992-93 dues reduction plan.[9] They claim the dismissal should be reviewed by this Court because it is in conflict with *Keller*, the First Circuit's subsequent decision in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), and an earlier decision of the New Hampshire Supreme Court in *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753 (N.H. 1986). There is no such conflict.

First, the Wisconsin Supreme Court rule petitioners fault was not adopted by the Wisconsin Supreme Court until April 14, 1993, six months *after* the district court dismissed this action. *In the Matter of the Amendment of Supreme Court Rules: 10.03(5)(b)*, 174 Wis. 2d xiii (1993). Therefore, the rule was not before the Seventh Circuit when it rendered the decision challenged here. Petitioners are improperly attempting to use a petition for certiorari to press new challenges.

Second, as the courts below properly found, the rules and bylaws which *were* before them were expressly founded on the standard promulgated by this Court in *Keller*. 810 F. Supp. at 981 (App. 46a); 12 F.3d at 1405 (App. 17a).[10] For example, the rule's definition of those activities which may be funded with mandatory dues

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[9] Petitioners also sought a preliminary injunction to prevent the reintegration of the bar on the same grounds. It was in the context of that motion that the district court analyzed and rejected petitioners' claims. 810 F. Supp. at 980-82 (App. 45a-49a). Because the court properly found against petitioners on the merits of their claim, it denied their second motion for preliminary injunction and dismissed the second motion for declaratory judgment.

[10] Indeed, petitioners concede as much. *See* Pet. at 15 n.16.

states: "The State Bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar." SCR 10.03(5)(b)(1). This is, in large part, a direct quote of this Court's language in *Keller*. *See* 496 U.S. at 14 ("the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State") (citation omitted), *and id.* (an integrated bar may "constitutionally fund activities germane to [the] goals [of regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside those areas of activity."). *See also In Matter of the State Bar of Wisconsin*, 169 Wis. 2d at 23-25, 485 N.W.2d at 226.

Further, the rules and bylaws which create the procedure for members to challenge the Bar's determination of chargeable activities incorporate all the requirements established in *Hudson* and approved in *Keller*. In *Hudson*, this Court established procedural safeguards which must be provided by a union collecting fair-share or agency fees to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining." *Hudson*, 475 U.S. at 302. The required procedure must include: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the

amounts reasonably in dispute while such challenges are pending." *Id.* at 310. *Keller* approved those procedures for use by an integrated bar in meeting its obligation to not fund non-germane political and ideological activities with mandatory dues. *Keller*, 496 U.S. at 17.

SCR 10.03(5)(b) and State Bar Bylaw Article I, Section 5 more than meet these requirements. They require advance written notice of the activities determined to be chargeable and non-chargeable, the costs of those activities and how the costs were calculated; provide a procedure for challenges to the determination to promptly be heard by an impartial arbitrator; and allow challengers to defer payment of *any* dues until after the arbitrator's decision has been issued. 12 F.3d at 1405 (App. 18a).

Third, there is no conflict with *Schneider*. Like the Wisconsin procedure, the *Schneider* Court defined the activities which may be funded with mandatory dues by quoting *Keller*. *Schneider*, 917 F.2d at 640.

Finally, petitioners assert the Court should grant their petition because of a perceived conflict with the decision of the New Hampshire Supreme Court, issued several years *prior* to *Keller*, in *Petition of Chapman*. This argument makes no sense whatsoever. Even if there were such a conflict, it would be irrelevant. *Keller* is the most recent pronouncement of this Court concerning the constitutional use of mandatory bar dues and the protections which integrated bars must provide. *Keller*, not *Chapman*, is the law. Since the decision below is in complete accord with *Keller*, the petition for certiorari should be denied.

II. THE QUESTIONS LEFT UNANSWERED BY *KELLER* ARE NOT RAISED BY THIS CASE.

Petitioners' second basis for requesting that this case be reviewed is to resolve a question left unanswered in *Keller*, namely what specific activities constitutionally may be funded with mandatory dues. *See Keller*, 496 U.S. at 15 ("Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern."). On the record in this case, however, that issue is not presented.

When judgment in this case was entered, the arbitration proceeding challenging the Bar's application of SCR 10.03(5)(b) and Bylaw Article I, Section 5 for fiscal year 1992-93 had not yet been completed. Therefore, petitioners' challenges to the use of their mandatory dues for particular activities were not ripe and were dismissed. Although petitioners attempted on several occasions to bring the subsequent arbitrator's decision before the Court of Appeals, the court rejected petitioners' attempts to improperly expand the record and prolong this litigation. Thus "[t]he questions involving the power of . . . [the State] come here not so shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of . . . [state] power requires." *Lathrop*, 367 U.S. at 847 (citations omitted).

It has been only four years since this Court's decision in *Keller*. Since then, the Court has denied the petition for certiorari in *Schneider*, ___ U.S. ___, 112 S. Ct. 865 (1992), and dismissed as improvidently granted the petition in *Gibson*, ___ U.S. ___ 112 S. Ct. 633 (1991), both of which raised similar constitutional challenges to integrated bars. Like *Schneider* and *Gibson*, there is nothing about this case which warrants further review by this Court.

CONCLUSION

For all of the reasons discussed above, respondents State Bar of Wisconsin and Stephen L. Smay respectfully submit that the petition for a writ of certiorari should be denied.

Dated this 25th day of May, 1994.

Respectfully submitted,

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Wisconsin Supreme Court Rule 10.03(5)(b) (1992)

1. The state bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar. Other activities must be supported by voluntary dues, user fees or other sources of revenue.

2. Prior to the beginning of each fiscal year, the state bar shall publish written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues. The notice shall indicate the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata portion, according to the class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues. The notice shall be sent to every member of the state bar along with the annual dues statement. A member of the state bar may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues.

3. A member of the state bar who contends that the state bar incorrectly set the amount of dues that can be withheld may deliver to the state bar a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the member's dues statement.

4. If one or more timely demands for arbitration are delivered, the state bar shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the state bar.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for members who have delivered timely demands for arbitration for a fiscal year, the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decision.

State Bar Bylaw Article I, Section 5 (1992)

(a) Demands for arbitration of the dues reduction under SCR 10.03(5)(b) shall be made in writing and shall be delivered to the Executive Director of the State Bar within 30 days of receipt of the member's dues statement. Delivery may be made in person or by first class mail, and mailed demands will be deemed delivered upon mailing. Demands shall include the name and address of the member or members demanding arbitration, a brief statement of the claim or objection, and the signature of the member or members.

(b) If one or more timely demands for arbitration are delivered, the State Bar shall agree to submit the matter forthwith to arbitration. All timely demands for arbitration shall be consolidated for hearing before the arbitrator appointed, and the provisions of sec. 788, Stats., shall apply as if the parties had entered into a written agreement for arbitration. A member demanding arbitration is required to pay his or her dues by October 31 or 15 days following the arbitrator's decision, whichever is later. Failure to pay dues by such date shall automatically suspend the delinquent member.

(c) Upon receipt of all demands for arbitration, the State Bar shall apply for appointment of an impartial arbitrator to the Chief Judge of the Federal District Court for the Western District of Wisconsin.

(d) Members demanding arbitration shall have access to the financial records upon which the State Bar based the determination of the amount of dues that can

be withheld. These records shall be available for inspection and copying during normal business hours. Copying shall be at the member's expense.

(e) The arbitrator shall determine the date, time and location of the arbitration hearing(s) and shall so notify the parties at least 15 days prior to said hearing(s). The arbitrator will promptly hold hearings in which the parties will be permitted to participate personally or through a representative. The State Bar shall bear the burden of proof regarding the accuracy of the determination of the amount of dues that can be withheld. All parties will be given the opportunity to present evidence and to present arguments in support of their positions. The following rules shall apply to the arbitration proceedings:

i. There will be no transcripts or post-hearing briefs.

ii. The arbitrator will issue an award stating the reasons for the decision within five business days of the closing of the hearing. The opinion will be brief, and based on the evidence and arguments presented.

iii. The arbitrators will charge a maximum of $100 per hour for services, including the hearing, preparation and study time, and shall be reimbursed for all necessary expenses of the arbitration.

iv. The hearing shall be held within 30 days of the appointment of the arbitrator.

v. The arbitrator shall not be deemed a necessary party in judicial proceedings relating to the arbitration.

vi. The arbitrator shall have no authority to add, subtract, set aside or delete from any Supreme Court Rule, or State Bar Bylaw.

(f) Members first admitted to the State Bar after the date of notification to members shall be given that notification with their initial dues statements. Such members shall be further notified that they may deliver a demand for arbitration within 30 days following receipt of the notification. If arbitration is pending at the date of delivery of a demand for arbitration by a newly admitted member, the newly admitted member's demand shall be consolidated with the pending arbitration. All of the provisions of this section shall otherwise apply to demands for arbitration filed by newly admitted members.